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In The

Supreme Court of the United States

THE CITY OF MARYSVILLE,
A WASHINGTON MUNICIPAL CORPORATION,

Petitioner,

v.

VINE STREET COMMERCIAL PARTNERSHIP,
A WASHINGTON GENERAL PARTNERSHIP, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Washington, Division I

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Is a plaintiff entitled to assert a claim under the federal Civil Rights Act, 42 U.S.C. § 1983, based solely upon a violation of the United States Constitution's Contract Clause, Art. I, § 10, cl. 1, or are the only remedies available for violation of the Contract Clause either declaratory and/or injunctive relief?

(2) Should this Court overturn its decision in *Carter v. Greenhow*, 114 U.S. 317 (1885), which held that the only remedy for violation of the United States Constitution's Contract Clause, Art. I, § 10, cl. 1, was declaratory relief?

PARTIES

The parties to the proceedings below were:

Petitioner: The City of Marysville, a municipal corporation of the State of Washington. Petitioners were aligned as defendants/appellees below.

Respondents: Vine Street Commercial Partnership, a Washington general partnership, and Smokey Point Properties, a Washington general partnership consisting of Ralph Monty and Mary Ann Monty, husband and wife; Henry R. Stampf and Cindy Stampf, husband and wife; J. Robert Sandstrom and Karlene Sandstrom, husband and wife; and Ron Huitger, a single man. Both Vine Street Commercial Partnership and Smokey Point Properties were aligned as plaintiffs/respondents below.

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PETITION FOR WRIT OF CERTIORARI

The City of Marysville respectfully petitions for a Writ of Certiorari to review the decision of the Washington State Court of Appeals, Division I, filed September 2, 2003, regarding the issue of whether a plaintiff may pursue a claim under the federal Civil Rights Act, 42 U.S.C. § 1983, based solely upon a violation of the Contract Clause of the United States Constitution, Art. 1, § 10, cl. 1.

OPINIONS AND ORDERS BELOW

The Opinion for which the City seeks review is the opinion of the Court of Appeals of the State of Washington, Division I, dated September 2, 2003. This decision is unpublished. App. 1 The Order Denying Reconsideration is also unpublished. App. 16. The Order Denying Motion for Reconsideration by the Washington State Supreme Court, dated October 2, 2003, is unpublished. App. 61. The trial court Order on Motions for Summary Judgment is also unpublished. App. 34. The Opinion of the Court of Appeals for the State of Washington, Division I, in the first appeal of this case (1999) is published at 98 Wn. App. 541, 989 P.2d 1238. App. 18.

JURISDICTION

The Opinion of the Court of Appeals of the State of Washington, Division I, was filed on September 2, 2003, and became the decision terminating review by the Washington State Courts of Appeals on June 23, 2004. App. 1. An Order Denying Motion for Reconsideration was entered on October 2, 2003. App. 16. An Order Denying Petition for

Review was entered by the Washington State Supreme Court on June 2, 2004. App. 61. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Civil Rights Act, 42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Contract Clause of the United States Constitution, Article I, § 10:

Clause 1: No state shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of

Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

STATEMENT OF THE CASE

This case presents the question of whether a violation of the Contract Clause of the United States Constitution can be remedied under the federal Civil Rights Act. Specifically, can a court award monetary damages and/or attorney's fees to a plaintiff under the federal Civil Rights Act, 42 U.S.C. § 1983, based solely upon a violation of the United States Constitution's Contract Clause, Art. 1, § 10, cl. 1; or is the only remedy declaratory relief?

In *Carter v. Greenhow*, 114 U.S. 317 (1885), this Court held that a plaintiff's sole remedy for violation of the Contract Clause was declaratory relief. This holding in *Carter* was recently cited with approval by this Court in *United States v. Winstar Corporation,* 518 U.S. 839 (1996). Thus, it does not appear that a plaintiff can assert a claim under 42 U.S.C. § 1983 based solely on a violation of the Contract Clause. **But the United States Supreme Court has never specifically addressed this constitutional issue.** Also, since *Winstar* was published, there continues to be confusion in the lower federal and state courts regarding the specific issue presented in this petition, *i.e.*, whether a plaintiff has a claim under 42 U.S.C. § 1983 based solely on a violation of the Contract Clause.

The issue presented herein involves the application of important constitutional provisions to governmental contracts. It requires this Court to determine if there is a distinction between the unconstitutional impairment of a

contract right and the violation of a civil right. To the best of the City's knowledge, a contract right has never before been recognized as an inalienable right, such as are embodied in an individual's civil rights. A contract right is something bargained for, not an inherent, individual right. For that reason, it is protected under the Contract Clause of the Constitution, Art. 1, § 10, cl. 1, not the various articles and amendments which protect an individual's inalienable civil rights.

In *Carter*, this Court recognized that the Contract Clause does not "confer upon or secure to any person any individual rights." *Carter*, 114 U.S. at 322. Because the Contract Clause does not confer any federal rights on any individual, a violation of the Contract Clause does not, by itself, give rise to a civil rights violation under 42 U.S.C. § 1983. The Court recognized this in *Carter* when it held that the only remedy for a violation of the Contract Clause was the right "to have a judicial determination declaring the nullity of the attempt to impair [the contract's] obligation." *Id.*

It is for this same reason that this Court has previously held that the Supremacy Clause (Art. VI, cl. 2 of the United States Constitution) also does not give rise to a claim under § 1983:

> **The Supremacy Clause is not, standing alone, the source of any substantive federal rights**, but secures federal rights by giving them priority when they conflict with state law.

Northern Natural Gas Co. v. Munns, 254 F. Supp. 2d 1103, 1117 (S.D. Ia. 2003) (emphasis added), *citing Golden State Transit Corporation v. Los Angeles*, 493 U.S. 103, 107, 107 L. Ed. 2d 420, 110 S.Ct. 444 (1989). Accordingly, a violation

of the Supremacy Clause does not, by itself, give rise to a § 1983 claim. *Golden State*, 493 U.S. at 107-08. The exact same analysis this Court applied to the Supremacy Clause in *Golden State* is applicable to the Contract Clause.

The State of Washington's decision in *Vine Street II*, which has elevated the status of a contract right to an inalienable civil right, is unprecedented. Whether the states and federal government should recognize a new civil rights claim under 42 U.S.C. § 1983 is a decision best made by this Court, after a careful analysis of all constitutional authority on the issue, and with a clear understanding that such determination would be contrary to this Court's present authority, as set forth in *Carter v. Greenhow.*

1. Facts Giving Rise To Case.

The City of Marysville has been incorporated since 1891, has a current population of less than 30,000, and is located in Snohomish County, Washington. Vine Street Commercial Partnership and Smokey Point Properties (hereinafter, collectively, "Vine Street") are land developers that own private property outside the City limits of Marysville, in unincorporated Snohomish County. The City owns and operates a sewer treatment plant, conveyance lines, and other infrastructure. The City has historically provided water and sewer service to its residents and, by agreement, to properties in unincorporated Snohomish County. For more than 20 years before this case arose, pursuant to a lawfully adopted provision of the Marysville Municipal Code, the City's ability to supply sewer and water service outside the City limits was conditioned upon a property owner's agreement either to annex to Marysville or

sign a covenant agreeing not to protest future annexation (the "Annexation Requirement"). This case initially arose because Vine Street refused to comply with Marysville's Annexation Requirement.

In the mid-1990's, Vine Street began plans to commercially develop their Snohomish County properties. As a condition of obtaining development permits from Snohomish County (the local government for the area where their properties are located), they were required to provide proof of sewer and water utilities to the County. Vine Street believed that sewer and water utilities would need to be provided to their properties by the City of Marysville. Thus, in approximately 1995, Vine Street applied for "Utility Commitment Letters" from Marysville.

Unfortunately, Vine Street refused to comply with Marysville's Annexation Requirement because they had previously, and voluntarily, signed petitions to annex to a different city, the City of Arlington. Vine Street contended, however, that they had a "contract right" to receive utilities from Marysville, because their properties were located in a Utility Local Improvement District ("ULID") that had been assessed by Marysville for the construction of sewer lines *prior* to the date that the Annexation Requirement had been enacted by ordinance. Vine Street claimed that being forced to comply with the Annexation Requirement was an unlawful condition of their contract right to receive sewer (and water) from Marysville and, specifically, was an unconstitutional impairment of such contract right resulting in a violation of the Contract Clause of the United States Constitution Art. I, § 10, cl. 1. App. 73.

2. Initial Trial Court Proceedings.

Vine Street filed this lawsuit in December 1995, requesting that the trial court issue a Writ of Mandamus ordering Marysville to provide them with Utility Commitment Letters for sewer and water utilities. The trial court denied Vine Street's request for a Writ and ordered Vine Street to exhaust their administrative remedies, but did not dismiss their action. App. 98.

Several months later, Marysville entered into a voluntary agreement with the City of Arlington and the local Fire District that, among other things, allowed Marysville to supply sewer and water service to a number of properties, including Vine Streets' properties. The City then adopted Ordinance No. 2095, which eliminated the Annexation Requirement as to Vine Streets' properties.

In 1996, the City issued Utility Commitment Letters for sewer and water utilities to Vine Street. Thereafter, the City moved to dismiss Vine Streets' mandamus action as moot. In response, Vine Street amended their mandamus action into a civil action for damages. App. 64 and 114.

Although Vine Street had received their Utility Commitment Letters and soon thereafter completed construction of their commercial projects, they continued to pursue litigation against the City for "delay" damages they claimed to have incurred during their alleged approximate six-month period of delay.[1]

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[1] The maximum period of delay was from March 25, 1996, when Vine Street exhausted their administrative remedies by seeking variances, to October 14, 1996, when the City issued them Utility Commitment Letters.

In June, 1997, the City moved for summary judgment on the merits, based upon the legality of its Annexation Requirement. The trial court *granted* the City's motion and dismissed this lawsuit. App. 52 and 55.

3. First Appeal to the Court of Appeals, Division I.

In the first appeal of this case (*Vine Street I*) the Washington State Court of Appeals, Division I, reversed the trial court's order of dismissal, holding that the City had violated the Contract Clause of the Washington Constitution by refusing to issue Utility Commitment Letters to Vine Street. App. 18. Division I then remanded to the trial court for a "trial on damages or such other disposition" consistent with its opinion. App. 19.

4. Remand to the Trial Court.

On remand, the parties filed cross-motions for summary judgment. Of importance to this Petition for Writ of Certiorari was the trial court's entry of an order holding that Vine Street had established liability against the City for unconstitutional impairment of a contract right, which – the trial court further held – entitled Vine Street to damages under 42 U.S.C. § 1983 for a *de facto* violation of their civil rights. App. 40. The City protested this decision, steadfastly maintaining that a violation of the Contract Clause cannot be remedied through a § 1983 claim, and that damages are not an available remedy for a violation of the Contract Clause at all. The trial court granted the City an immediate interlocutory appeal to allow the Court

of Appeals to address this issue, as well as other issues raised by the City.[2] App. 42.

5. Second Appeal to the Court of Appeals, Division I.

In *Vine Street II*, Division I of the Washington State Court of Appeals affirmed the trial court's order allowing Vine Street to proceed to a trial on damages pursuant to 42 U.S.C. § 1983 based solely upon unconstitutional impairment of a contract right. App. 12-15. This opinion became the decision terminating review by the State of Washington on June 23, 2004.

The Washington State Court of Appeals' decision in *Vine Street II* is contrary to the United States Supreme Court case law authority on this issue. The Court of Appeals even admitted, in its written decision, that there was no legal authority to support an award of damages for a *civil* rights violation under § 1983 based upon unconstitutional impairment of a *contract* right. On page 11 of its opinion, the Court of Appeals wrote:

> The City cites authority to support its argument that absent an independently pleaded basis for damages, injunctive relief is the sole remedy for unconstitutional impairment of contract. **The property owners do not cite any contrary authority.**

App. 12. (Emphasis added). Without explanation, and without citation to any authority, the Court of Appeals mysteriously left this point hanging.[3]

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[2] No other issues are the subject of the City's Petition for Writ of Certiorari.

The City requests this Court to accept certiorari to decide this important constitutional issue, *i.e.*, whether a plaintiff has a claim under the federal Civil Rights Act, 42 U.S.C. § 1983, based solely upon a violation of the Contract Clause of the United States Constitution, Art. I, § 10, cl. 1, when such a determination would seem to be contrary to this Court's decision in *Carter v. Greenhow*, 114 U.S. 317 (1885), which holds that the right to declaratory relief is the "only right secured to him by this [the Contract] clause of the Constitution?"

REASONS FOR GRANTING THE WRIT

The Court should grant this petition because the United States Supreme Court has never before issued a decision addressing this specific and important constitutional issue, *i.e.*, whether a plaintiff has a claim under the federal Civil Rights Act, 42 U.S.C. § 1983, based solely upon a violation of the Contract Clause of the United States Constitution, Art. 1, § 10, cl. 1. Because this Court has never addressed this issue, the lower federal and state courts are in conflict over this issue.

Additionally, a decision by this Court on this issue will have broad and substantial application nation-wide, affecting every level of federal, state, regional, and local government, and will impact how government enters into and enforces contracts. Finally, the Washington State Court of Appeals' decision appears to be directly contrary

[3] In a non-sequitor, the court immediately went on to discuss its reasons and authority for dismissing Vine Street's common law breach of contract claim.

to this Court's decision in *Carter v. Greenhow*, which held that the only remedy provided for violation of the Contract Clause of the United States Constitution, Art. I, § 10, cl. 1, is equitable relief in the form of a declaration of invalidity of the challenged government action.

1. The Washington State Decision Conflicts With Decisions By This Court.

The Washington State Court of Appeals, in its opinion of September 2, 2003 (*Vine Street II*), held that the City had violated Art. I, § 23 of the Washington State Constitution.[4] App. 2. This claim is commonly referred to as unconstitutional impairment of a contract right, and/or violation of the Contract Clause. The Court then went on to hold that Vine Street was "entitled to proceed [with a trial] on their claim for damages under 42 U.S.C. § 1983," based solely on the City's violation of the Contract Clause. App. 15.

Contrary to Washington's decision in *Vine Street II*, over 100 years ago this Court plainly stated that a cause of action for damages is *not* available to a plaintiff for unconstitutional impairment of a contract right. *See, Carter v. Greenhow*, 114 U.S. 317 (1885). In *Carter*, this Court specifically discussed the plaintiff's rights under the Contract Clause as follows:

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[4] The Washington State Constitution's Contract Clause has the same force and effect as the United States Constitution's Contract Clause, Art. I, § 10, cl. 1. *Caritas Services, Inc. v. Dept. of Social & Health Services*, 123 Wn.2d 391, 402, 869 P.2d 28 (1994). In their Amended Complaint, Vine Street pled a violation of the United States Constitution's Contract Clause. App. 73.

> **How and in what sense are [contract] rights secured to him by the Constitution of the United States? The answer is, by that provision, article 1, § 10,** which forbids any state to pass laws impairing the obligations of contracts. **That constitutional provision, so far as it can be said to confer upon or secure to any person any individual rights, does so only indirectly and incidentally.** It forbids the passage by the states of laws such as are described. If any such are nevertheless passed by the legislature of a state, **they are unconstitutional, null, and void.** In any judicial proceeding necessary to vindicate his rights under a contract affected by such legislation, **he has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the constitution.**

114 U.S. at 322 (emphasis added).

Subsequently, this Court, in *Dennis v. Higgins*, 498 U.S. 439, 111 S.Ct. 865, 112 L. Ed. 2d 969 (1991), briefly noted that *Carter* might mean only that a plaintiff cannot attempt to litigate his rights under the Contract Clause unless he has actually pled a violation of the Contract Clause. The plaintiff in *Carter* had filed only a common law breach of contract claim.[5] However, this brief footnote in *Dennis* does *not* hold that *Carter* can be disregarded so

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[5] In a footnote in *Dennis*, this Court said that *Carter* "held as a matter of pleading that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the right secured to him by that clause of the Constitution [the Contract Clause], to which he had chosen not to resort." *Dennis*, 498 U.S. at 451, n. 9.

far as determining a party's remedial rights under Art. I, § 10 of the United States Constitution. In fact, based on language in a subsequent United States Supreme Court decision, *U.S. v. Winstar Corp., infra*, this Court itself appears to have affirmed that *Carter* is still authoritative as to the remedies available to a plaintiff for a violation of the Contract Clause.

In *U.S. v. Winstar Corp.*, 518 U.S. 839 (1996), a case decided *after Dennis*, this Court cited to *Carter* with approval for the proposition that, while specific performance is a remedy for "breach of contract," it is *not* a remedy for violation of the Contract Clause:

> *See, e.g., Carter v. Greenhow* (stating that 'the only right secured' by the Contract Clause is 'to have a judicial determination, declaring the nullity of the attempt to impair [the contract's] obligation').

Winstar, 518 U.S. at 887, n. 32.

The Fourth Circuit then brought this issue to this Court's attention when it filed a Petition for Writ of Certiorari of the decision issued in *Andrews v. Anne Arundel County, Md.*, 931 F. Supp. 1255 (D. Md. 1996), *affirmed*, 114 F.3d 1175 (4th Cir. 1997), *cert. denied*, 139 L. Ed. 2d 489, 118 S.Ct. 600 (1997). In the *Andrews* decision, the Fourth Circuit affirmed the District Court's decision holding that plaintiffs did not have a cause of action under 42 U.S.C. § 1983 based solely on a violation of the Contract Clause. In *Andrews*, after finding that the County had unconstitutionally impaired plaintiff's contract right, the District Court discussed plaintiff's request for attorney's fees under 42 U.S.C. § 1988:

> In addition to the assertion of the Contract Clause claim . . . plaintiffs have sought to assert a claim under 42 U.S.C. § 1983, admittedly, in commendable condor, solely to provide a basis for seeking their attorney's fees and costs under 42 U.S.C. § 1988. **I decline, however, . . . to rule on the basis of a forecast that the Supreme Court will at its first opportunity expressly overrule *Carter v. Greenhow***, 114 U.S. 317, 322, 5 S.Ct. 928, 930-31, 29 L. Ed. 202, 204 (1885) (no § 1983 claim lies for a Contract Clause violation).

Andrews, 931 F. Supp. at 1267 (emphasis added). As noted, this Court did *not* accept review of the Fourth Circuit's decision in *Andrews*, which clearly held that *Carter v. Greenhow* is good law, and that no claim under § 1983 is available for a violation of the Contract Clause.

In reviewing these decisions – from *Carter v. Greenhow* (1885) through this Court's decision to deny certiorari in *Andrews v. Anne Arundel County* (2000) – the City of Marysville believes this Court has firmly held, repeatedly, that the only remedy available for a violation of the Contract Clause is a judicial determination declaring the attempt to impair the contract void. Thus, Marysville believes there can be no damage remedy under § 1983 or an attorney's fee claim under § 1988 based solely upon a violation of the Contract Clause. Unfortunately, the state of Washington courts and the Ninth Circuit are somewhat confused on this issue. For instance, in the case at bar, the State of Washington, without citation to any authority or discussion of any kind, issued a decision giving Vine Street a right to damages under § 1983 based solely on unconstitutional impairment of a contract right. The Ninth Circuit

has recently done the same thing. *See, Southern California Gas Co. v. City of Santa Ana, infra.*

Because the City believes Washington was incorrect in issuing its decision in *Vine Street II*, and because of confusion in the lower courts, the City respectfully requests that this Court accept certiorari and issue a decision specifically address – for the first time – whether a claim is, or is not, available under § 1983 based solely on a violation of the Contract Clause of the United States Constitution.

2. Decisions of The Lower Federal Courts And State Courts.

a. The Fourth Circuit.

Consistent with decisions from this Court, the Fourth Circuit has definitively held that plaintiffs may not bring a claim for damages under 42 U.S.C. § 1983 based solely on a violation of the Contract Clause of the United States Constitution. *See Andrews v. Anne Arundel County, Md.*, 931 F. Supp. 1255 (D. Md. 1996), *aff'd*, 114 F.3d 1175 (4th Cir. 1997), *cert. denied*, 139 L. Ed. 2d 489, 118 S.Ct. 600 (1997), where the District Court of Maryland, in reliance upon this Court's decision in *Carter v. Greenhow*, denied plaintiffs' claims for damages brought under 42 U.S.C. § 1983 for a violation of the federal Contract Clause. The district court held as follows:

> In addition to the assertion of the Contract Clause claim, . . . plaintiffs have sought to assert a claim under 42 U.S.C. § 1983, admittedly, in commendable candor, solely to provide a basis for seeking their attorneys' fees and costs under 42 U.S.C. § 1988 [FN 13]

> FN 13. Although the complaint is unartfully pled as asserting a claim "for violation of" § 1983, plaintiffs have clarified that they intended to assert a claim *under and pursuant to* § 1983 for the underlying Contract Clause violation. . . . **[F]or the reasons set forth in this section of this opinion, plaintiffs may not seek damages under § 1983.**
>
> **I decline, however, . . . to rule on the basis of a forecast that the Supreme Court will at its first opportunity expressly overrule *Carter v. Greenhow*,** 114 U.S. 317, 322, 5 S.Ct. 928, 930-31, 29 L. Ed. 202, 204 (1885) (no § 1983 claim lies for a Contract Clause violation).

Andrews, 931 F. Supp. at 1267 (emphasis added).

Here, the Washington State Court of Appeals has done exactly what the District Court of Maryland refused to do in *Andrews*, *i.e.*, Washington appears to have based its holding in *Vine Street II* on a "forecast" that this Court will, at its first opportunity, expressly overrule its holding in *Carter*.[6] The *Andrews* court went on to address the continuing significance of this Court's decision in *Carter v. Greenhow*, and the difference between common law *breach* of contract, which allows a remedy in damages, and unconstitutional *impairment* of a contract, which allows only for a declaration that voids the law causing such impairment:

> In *Carter*, the Supreme Court determined that, in fact, only one remedy was available under the Contract Clause:

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[6] In actuality, the Washington Court of Appeals gave no explanation whatsoever in support of it decision in *Vine Street II*. App. 12-13.

> . . . **the individual has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation**. This is the *only right* secured to him by that clause of the constitution.

114 U.S. at 322, 5 S.Ct. at 930-31. *See, also Ex parte Ayers,* 123 U.S. 443, 504, 8 S.Ct. 165, 182, 31 L. Ed. 216 (1887) (quoting *Carter* with approval).

> **Damages are available, however, for a breach of contract**. "The Supreme Court in the context of the Contract Clause has drawn a distinction between a breach of a contract and impairment of the obligation of the contract." *Hays v. Port of Seattle*, 251 U.S. 233, 237, 40 S.Ct. 125, 126-27, 64 L. Ed. 243 (1920). . . . *See, also, Horwitz-Matthews, Inc. v. City of Chicago*, 78 F.3d 1248 (7th Cir. 1996) (Posner, C.J.) (explaining the difference between legislation which "leaves the promises with a remedy in damages for breach of contract and one that extinguishes the remedy"; only the latter involves the Contract Clause); *Jackson Sawmill Co. v. United States,* 580 F.2d 302, 311-12 (8th Cir. 1978) (same).

Andrews, 931 F. Supp. at 1267, n. 14 (emphasis in bold added; emphasis in italics in original).

Many courts, such as *Andrews,* have struggled with the distinction between an unconstitutional "impairment" of a contract (*i.e.,* a violation of the Contract Clause of the United States Constitution) and "breach" of contract. Virtually all have concluded that there is no remedy in damages for an unconstitutional impairment of a contract right. The only remedy is to nullify or "void" the offending ordinance or law. *See, e.g., Horwitz-Matthews, Inc. v.*

Chicago, 78 F.3d 1248, 1251 (7th Cir. 1996) and *E & E Hauling, Inc. v. Forest Preserve District*, 613 F.2d 675, 679 (7th Cir. 1980) (If a state or its subdivision passes a law and through enforcement of it prevents another party from fulfilling its obligation under the contract because the use of the ordinance precludes a damage remedy, the non-breaching party cannot be made whole. Instead, the law has impaired the obligation of the contract).

The following excerpt from yet another case further clarifies this distinction:

> **The Supreme Court has distinguished between an unconstitutional impairment of a contract obligation and a breach of contract for purposes of claims brought under the Contract Clause**. The distinguishing characteristic between an unconstitutional impairment and a contractual breach is **whether the non-breaching party has an available remedy**. If a state exercises legislative power in a way that eliminates the availability of a remedy or action for damages by the non-breaching party, the state has impaired the contract. In contrast, if some legislative action announces the state's refusal to perform its contractual obligation, the state has simply breached its contract . . . . In Horwitz-Matthews, the Seventh Circuit held that a state or local law unconstitutionally impairs a contract only when the law provides the state or one of its subdivisions with a complete defense to a breach of contract suit, **thereby preventing the other party from obtaining damages for breach of contract**.

Yellow Cab Co. v. Chicago, 3 F. Supp. 2d 919, 922-23 (N.D. Ill. 1998) (emphasis added). *See, also, Contemporary Music*

Group, Inc. v. Chicago Park District, 343 F. Supp. 505, 508 (N.D. Ill. 1972) (court held that it had long been settled that the Contract Clause does not allow a suit for damages).

b. The District Court of New York.

Contrary to decisions from this Court, in 1999, the District Court of New York held that plaintiffs may seek attorney's fees pursuant to 42 U.S.C. § 1988 based solely upon a violation of the Contract Clause of the federal constitution. *TM Park Ave. Assoc. v. Pataki*, 44 F. Supp. 2d 158, 160-71 (N.D.N.Y. 1999) (*TM Park II*), *reversed on other grounds*, 214 F.3d 344 (2000).[7] In its analysis, the District Court of New York stated as follows:

> While, upon initial impression, *Carter* seemingly holds that a claim for the violation of the Contract Clause may not be maintained under § 1983, *see Dennis v. Higgins*, . . . ; *Andrews v. Anne Arundel County*, . . . that is not so. The Supreme Court affirmed the dismissal of Carter's action upon the limited ground that Carter failed to state a claim under § 1983 because it only pleaded a breach of contract claim. . . . It, thus, could be argued that the *Carter* court implicitly

[7] *TM Park II* was subsequently reversed by the Second Circuit Court of Appeals, based on the Court of Appeals' holding that there was no violation of the Contract Clause. *See, TM Park Ave. Assoc. v. Pataki*, 214 F.3d 344, 350 (2000) (*TM Park III*). In *TM Park III*, the Second Circuit did not specifically address the issue now before this Court in this Petition for Writ of Certiorari. In a previous decision, however, the Second Circuit had expressed doubt as to whether suits for violations of the Contract Clause could be brought under § 1983. *See Haley v. Pataki*, 106 F.3d 478, 481-82, n. 2 (2nd Cir. 1997). The Second Circuit has not addressed this issue again since its decision in *TM Park II* (1999).

> recognized that a claim for a violation of the Contract Clause *could* be brought pursuant to § 1983 assuming a properly pleaded Complaint.
>
> . . . In other words, because Carter failed to plead that he was deprived of a right guaranteed to him by the Contract Clause, he did not state a claim under § 1983. Accordingly, it becomes apparent that the *Carter* Court did not hold that § 1983 was not a proper avenue to redress a violation of the Contract Clause, but only that the facts in Carter's Complaint failed to show a cause of action within § 1983's terms.

TM Park II, 44 F. Supp. at 160-62 (emphasis in original).

The *TM Park II* court went on to state that "more recent Supreme Court cases also support the conclusion that a claim alleging a violation of the Contract Clause may be pursued under § 1983," citing *Dennis v. Higgins, supra*.

However, the District Court of New York did not consider this Court's more recent opinion in *U.S. v. Winstar, supra*, where this Court cited with approval to that portion of *Carter v. Greenhow* which held that the only right secured by the Contract Clause was the right to have a judicial determination declaring the nullity of the attempt to impair the contract's obligation. *Winstar*, 518 U.S. at 887, n. 32. By failing to take *Winstar* into consideration, the analysis in *TM Park II* is most certainly flawed.[8]

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[8] *TM Park II* was also decided before this Court declined certiorari in *Andrews v. Anne Arundel County, Md., supra*.

c. The Ninth Circuit.

In 2003, the Ninth Circuit Court of Appeals filed an opinion, *per curiam*, in which it stated that violation of the United States Contract Clause may give rise to a cause of action for damages under 42 U.S.C. § 1983. *See*, *Southern California Gas Co. v. Santa Ana*, 336 F.3d 885, 887 (9th Cir. 2003). The Ninth Circuit offered no authority in support of its opinion, stating only that the rights guaranteed by § 1983 should be "liberally and beneficially construed." *Id.*

The Ninth Circuit went on to assert that it does not think its opinion is contrary to this Court's decision in *Carter v. Greenhow*, citing the "narrow" reading this Court gave *Carter* in footnote 9 of this Court's decision in *Dennis v. Higgins, supra*. However, just as the District Court of New York did in *TM Park II*, the Ninth Circuit ignored this Court's decision in *U.S. v. Winstar, supra,* which was published in 1996, after *Dennis*. The Ninth Circuit also failed to acknowledge that this Court denied certiorari of the Fourth Circuit's decision in *Andrews v. Anne Arundel County, supra*. By failing to take *Winstar* and *Andrews* into consideration, the Ninth Circuit's analysis in *Southern California Gas* is fatally flawed.

d. Some courts have implicitly allowed damage claims under § 1983.

To add to the confusion, some state and lower federal courts, while not specifically addressing whether a Contract Clause claim is actionable under § 1983, have implicitly accepted the position that it is by allowing contract claims to proceed under § 1983. *See, Heart of America Grain Inspection Services, Inc. v. Missouri Dept. of Agriculture*, 123 F.3d

1098, 1106 (8th Cir. 1997); *Edwards v. City of Manchester*, 121 F.3d 695 (1st Cir. 1997); *Ross v. City of Berkeley*, 655 F. Supp. 820 (N.D. Cal. 1987); *Bd. of Administration v. Wilson*, 57 Cal. App. 4th 967, 974, n. 10; 67 Cal. Rptr. 2nd 477 (1997) (court specifically stated that it is assumed for purposes of this appeal that a Contract Clause claim was within the scope of § 1983); *Calabro v. City of Omaha*, 247 Neb. 955, 975, 531 N.W.2d 541 (1995) (court assumed that a violation of the Contract Clause was also a violation of § 1983).

e. Some courts have questioned whether claims under § 1983 are allowable, but have not specifically decided the issue.

Both the Second Circuit and the State of Oregon have questioned whether suits may be brought under the federal Civil Rights Act for violations of the Contract Clause. In *Haley v. Pataki*, 106 F.3d 478, 481-82, n. 2 (2nd Cir. 1997), the Second Circuit dodged deciding the issue by finding that it had not been raised below. Citing to both *Carter v. Greenhow* and *Dennis v. Higgins*, the court noted "While it is not clear that suits for violations of the Contract Clause may be brought under section 1983, . . . this issue was neither argued below nor on appeal. Therefore, we will not consider this issue at this time." *Id.*

In *Allen v. County of Jackson County*, 169 Ore. App. 116, 7 P.3d 739 (2000), the majority held that defendant County had not unconstitutionally impaired any of plaintiff's contract rights. Thus, the majority did not "consider" whether a violation of the Contract Clause can be remedied through § 1983. *Allen*, 169 Ore. App. at 127-28, n. 6. The concurrence, however, presents a long, thoughtful analysis of the issue, and concludes (consistent with this

Court's decision in *Carter v. Greenhow*) that a violation of the Contract Clause does not give right to a § 1983 claim. *Id.* at 139-52.

CONCLUSION

Given this Court's decision in *Carter v. Greenhow*, which was cited with approval in *U.S. v. Winstar Corp.*, in addition to this Court's denial of certiorari in *Andrews v. Anne Arundel County,* it appears that declaratory relief is the only remedy available for a violation of the Contract Clause. It does not appear that a plaintiff can assert a claim under 42 U.S.C. § 1983 based solely on a violation of the Contract Clause. But this Court has never specifically addressed this constitutional issue, which is of significant public and governmental interest.

Additionally, the lower federal and state courts that have addressed this issue are in conflict. While the Fourth Circuit, since 1996,[9] has held that there is no remedy under 42 U.S.C. § 1983 for violation of the Contract Clause, the Ninth Circuit just recently issued a decision to the contrary.[10] While the Second Circuit[11] and State of Oregon[12] have questioned whether there is any remedy under § 1983 for violation of the Contract Clause, both the

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[9] *Andrews v. Anne Arundel County, Md.*, 931 F. Supp. 1255 (D. Md. 1996), *aff'd*, 114 F.3d 1175 (4th Cir. 1997), *cert. denied*, 139 L. Ed. 2d 489, 118 S.Ct. 600 (1997).

[10] *Southern California Gas Co. v. Santa Ana*, 336 F.3d 885, 887 (9th Cir. 2003).

[11] *Haley Pataki*, 106 F.3d 478, 482 (2nd Cir. 1997).

[12] *Allen v. County of Jackson County*, 169 Ore. App. 116, 7 P.3d 739 (2000) (*see* concurring opinion authored by Edmonds, P.J.).

state courts of California[13] and Nebraska[14] have issued decisions implicitly holding (without any analysis or discussion) that a violation of the Contract Clause can be remedied under 42 U.S.C. § 1983.

It is clear that this civil rights issue is ripe for a specific decision by this Court, particularly in light of the proliferation of litigation against government brought under 42 U.S.C. § 1983. It has been 120 years since this Court held, in *Carter v. Greenhow*, that the only remedy for violation of the Contract Clause was declaratory relief. The City now urges this Court to issue a decision, which can be clearly followed by all lower federal and state courts, specifically addressing whether a violation of the Contract Clause of the United States Constitution is, or is not, actionable under the federal Civil Rights Act, 42 U.S.C. § 1983.

Respectfully submitted this 30th day of August, 2004.

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[13] *Board of Administration v. Pete Wilson*, 57 Cal. App. 4th 967, 67 Cal. Rptr. 2d 477 (1997).

[14] *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995).

APPENDIX

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Amended Complaint for Damages filed in the Superior Court of the State of Washington in and for the County of Snohomish, dated December 4, 1996. The Amended Complaint attaches the following exhibits:.....App. 64

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Ex. B – City of Marysville Resolution No. 1787 .....App. 83

Ex. C – City of Marysville Resolution No. 1745 .....App. 92

Ex. D – Letter from Marysville City Administrator to Ralph Monty, dated September 1, 1995; .....App. 96

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Ex. G – Application for utility variance from the City of Marysville submitted by Vine Street Comm'l Partnership, dated January 26, 1996....App. 107

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A majority of the panel has determined that this opinion will not be printed in the Washington Appellate reports but will be filed for public record pursuant to RCW 2.06.040. IT IS SO ORDERED

/s/ Mary Kay Baker

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

VINE STREET COMMERCIAL PARTNERSHIP, a Washington General Partnership; SMOKEY POINT PROPERTIES, a Washington General partnership consisting of RALPH MONTY and MARYANN MONTY, husband and wife; HENRY R. STAMPF and CINDY STAMPF, husband and wife; J. ROBERT SANDSTROM and KARELENE SANDSTROM, husband and wife; and RON HUITGER, a single man, Respondents, v. THE CITY OF MARYSVILLE, a Washington Municipal Corporation, Appellant.	No. 50009-1-I DIVISION ONE UNPUBLISHED OPINION FILED: Sep 02 2003

SCHINDLER, J. – This is the second appeal in this case. *In Vine Street Commercial Partnership, et. al. v. The*

City of Marysville, 98 Wn. App. 541, 989 P.2d 1238 (1999), *rev. denied,* 141 Wn.2d 1006, 10 P.3d 1075 (2000), (*Vine I*), we reversed the trial court's dismissal of Vine Street Commercial Properties' and Smokey Point Properties' (the property owners) lawsuit against the City of Marysville and held that the City violated Article 1, section 23 of the Washington State Constitution by illegally imposing retroactive conditions that resulted in refusing to issue utility commitment letters or variances. We remanded for a trial on damages or such other disposition consistent with our opinion. On remand, the parties filed cross motions for summary judgment. The City filed three motions for summary judgment. The City's first summary judgment motion sought dismissal based on the fact that none of the property owners had paid the assessments levied against them for Utility Local Improvement District #1 (ULID #1) before the effective date of the City's annexation requirement. The City's second motion sought dismissal based on lack of jurisdiction and the statute of limitations. The City's third motion sought dismissal of the property owners' damages claims. The property owners moved for summary judgment on liability and to dismiss the City's affirmative defenses to liability not addressed in *Vine I*. These included the business judgment rule, discretionary governmental immunity, the statute of limitations, and its defense under *R/L Associates, Inc. v. City of Seattle,* 113 Wn.2d 402, 780 P.2d 838 (1989). The trial court denied the City's three summary judgment motions. The trial court granted the property owners' motion for summary judgment on liability and dismissed the City's affirmative defenses of the business judgment rule, discretionary governmental immunity, and that the property owners' claims under RCW 64.40 and 42 U.S.C. § 1983

were barred by the statute of limitations or *R/L Associates v. Seattle*.[1]

At the City's request, the trial court entered a final judgment under CR 54(b). The City appeals. We affirm the trial court's summary judgment order in all respects except its denial of the City's motion to dismiss the property owners' RCW 64.40 claim. We also conclude that while the property owners have a claim for 42 U.S.C. § 1983 damages based on the City's unconstitutional impairment of contract rights, the property owners in their amended complaint failed to state an independent claim for damages for breach of contract.

The facts of this case are set forth in *Vine I* and will not be repeated except as necessary to explain our analysis.

I.

Vine I and payment of ULID assessments

In 1973, the property owners petitioned the City to approve a Utility Local Improvement District for Smokey Point, an unincorporated area of Snohomish County located between Marysville and Arlington. The City of Marysville approved their request and formed ULID #1. Pursuant to RCW 35.44 and 35.49, the City levied assessments against the owners of property within ULID #1 to pay for the utility improvements. On July 28, 1975, the City passed Ordinance No. 861 confirming the final

[1] The City has not assigned error to the trial court's dismissal of the business judgment rule or discretionary governmental immunity defenses.

assessment roll for the properties in ULID #1. The first payments were not due until one year and thirty days after the adoption of Ordinance No. 861.

On January 26, 1976, the City of Marysville passed Ordinance No. 887. Ordinance No. 887 amended the City's code to require property owners to sign an annexation agreement or a covenant agreeing not to protest future annexation as a condition to providing water and sewer service outside of the City limits.[2] Sometime after this ordinance was passed, the property owners entered into agreements to annex to the City of Arlington.[3]

Approximately twenty years later, the property owners applied for utility commitment letters from Marysville for water and sewer service.[4] The City refused to issue utility commitment letters because the property owners had previously signed the annexation agreement with the City of Arlington and could not meet the requirements of Ordinance No. 887. There is no dispute that the assessments were not paid when the City adopted Ordinance No. 887.

Relying on *Vine I*, the City argues that because the property owners had not paid the assessments for ULID #1 before Ordinance 887's annexation requirement went into effect, their lawsuit should be dismissed because payment of these assessments is an essential element for the unconstitutional impairment of the contract claim. Although this court assumed the assessments had been

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[2] Ordinance No. 887, codified at MMC 14.32.040.

[3] The precise date of the agreements is not in the record on appeal.

[4] Proof of utility availability is required before Snohomish County will accept a formal application for a development permit.

paid when the City enacted Ordinance 887, this fact does not change our analysis and decision in *Vine I*.[5] When Ordinance 887 was enacted, the final assessment for ULID #1 had been approved and those assessments were "conclusive". RCW 35.44.190.

The trial court properly denied the City's motion for summary judgment.

II.

Jurisdiction and Statutes of Limitations

On October 5, 1995, the property owners filed a Petition for a Writ of Mandamus asking the court to direct the City to issue utility commitment letters. In their mandamus petition, the property owners asserted claims for damages, and included the following:

> 21.5 The City's action is in violation of the Civil Rights Act of 1871, 42 U.S.C. sec. 1983; the Petitioners reserve the right to amend this Petition to include a cause of action for damages incurred as a direct and proximate result of this alleged violation;
>
> 21.6 The City's action constitutes a violation of RCW 64.40.020 in that such action is arbitrary, capricious and unlawful; the Petitioners reserve the right to amend this Petition to include a cause of action for

[5] Moreover, this court denied the City's motion to reconsider our decision in *Vine I* because there was no evidence in the record indicating whether the assessments had been paid at the time the ordinance went into effect.

> damages incurred as a direct and proximate result of this alleged violation.[6]

The trial court denied the writ of mandamus because the property owners had 'failed to exhaust their administrative remedies' by seeking a variance from the City.[7]

The property owners then applied to the City for utility variances for sewer and water connections. The City denied the variances because the property owners could not comply with the annexation agreement requirements of Ordinance 887.

In April 1996, the property owners filed a Land Use Petition and Complaint for Declaratory Relief, asserting that the City's denial of utilities was based on an erroneous interpretation of law and that the City's ordinance was an unconstitutional impairment of contract in violation of article 1, section 23 of the Washington Constitution.

In October 1996, the City of Marysville and the City of Arlington agreed that the City of Marysville would provide utility services to ULID #1. The City then filed a motion to dismiss the mandamus action and the Land Use Petition and Declaratory Judgment Complaint as moot. The property owners opposed dismissal. The trial court dismissed the Land Use Petition and Declaratory Judgment Complaint because the City had agreed to provide utility services to ULID #1. The trial court did not dismiss the mandamus action, and allowed the property owners to file a motion to amend their Petition for a Writ of Mandamus to add claims for damages under RCW 64.40 and 42 U.S.C.

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[6] CP 746.

[7] CP 618. The court, however, did not dismiss the writ.

§1983. The court granted this motion but reserved ruling on whether the amended claims related back under CR 15.[8] The property owners filed an amended complaint on December 12, 1996.[9] The City's answer stated eighteen affirmative defenses, including lack of jurisdiction.[10] The trial court later specifically ruled that the amendments related back, because the City had notice of the RCW 64.40 and 42 U.S.C. §1983 claims in the Petition for Writ of Mandamus and these claims were based on the same set of facts set forth in the Petition.[11]

The City concedes that the mandamus action was properly commenced, and does not challenge jurisdiction for the mandamus action.[12] But the City claims that the amended complaint states a new and different cause of action, unrelated to the original mandamus action, and a summons and personal service were required. The City contends the court does not have jurisdiction because the property owners did not serve the City with a summons with they filed their amended complaint. The City also claims that personal service of the amended complaint was required, and the procedure used, service by mail of the complaint on the City's attorney, was insufficient to confer jurisdiction.

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[8] The court's order states: "granting of this motion does not resolve the issue of relation back of the amendments." CP 543.

[9] CP 503.

[10] CP 499-501.

[11] CP 136-7.

[12] There is no dispute that when the property owners filed the Petition for a Writ of Mandamus, they personally served the City.

The Civil Rules do not require a summons for additional pleadings once an action is properly commenced.[13] The service and filing requirements for amended complaints are governed by CR 5.[14] All pleadings following the original complaint must be filed with the court and served on a party's attorney, or if ordered by the court, on the party. CR 5(b)(1). CR 5(b)(1) authorizes service upon a party's attorney by mail.

The Washington Civil Rules are consistent with the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 5 is virtually identical to Washington's CR 5. Commentary to the federal rule suggests that a summons and personal service are not required when the new claims asserted in an amended complaint are "related to those set out in the original complaint". A summons and personal service are only necessary when the new claims are "radically different" from those in the original pleading.[15] 4 Wright & A. Miller, *Federal Practice and Procedure*, §1146 at 439 (3d Ed. 2002). As the trial court ruled, the damage claims asserted by the property owners in the amended complaint are based on the same set of facts set forth in the original mandamus action. The claims are "related"

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[13] CR 4(a)(4).

[14] CR 5 applies to "every pleading subsequent to the original complaint". CR 5(a).

[15] The only case cited by the City, in its reply brief in support of its personal service argument, is distinguishable. *Lasch v. Antkies,* 161 F.Supp. 851 (D.C. Pa. 1958), involves the issue of when a federal court has subject matter jurisdiction over a federal claim and personal jurisdiction under a statute providing for nationwide service, whether the court retains personal jurisdiction when a non-federal claim is added. The issue of whether service on an attorney of the additional non-federal claim is sufficient appears to be unresolved by the federal courts and is not the issue here. Wright & Miller, § 1146 p. 442.

and not "radically different" from those in the original mandamus action and a summons and personal service were not required.

The City argues that because the mandamus action was an equitable cause of action, the amended pleading adding claims for damages requires personal service and a summons. The City implies that a mandamus petition may not be amended to include damage claims, but instead must be dismissed and a new action commenced. The City cites no authority which supports this argument, nor has the City appealed the trial court's order allowing the property owners to amend the Petition for the Writ of Mandamus or its decision that the claims in the amended complaint relate back.[16] Moreover, the City does not explain why personal service on the City was required when the City's attorney filed a notice of appearance after the Petition for a Writ of Mandamus was filed specifically requesting that "all further pleadings" be served on the attorney.[17]

If, as we have concluded, the court has jurisdiction, the City concedes that the property owners' 42 U.S.C. §1983 claim is not barred by the three-year statute of limitations.

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[16] The case relied upon by the City, *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 175-78, 744 P.2d 1032 (1987), is not helpful. The City cites this case in support of its argument that a motion to amend must be personally served on the party, not his lawyer. But in that case, the court never acquired personal jurisdiction over out-of-state defendants because the service requirements for out-of-state defendants were not complied with. Here, the City does not challenge the court's jurisdiction over the City in the original mandamus action.

[17] CP 735.

The City argues however, that the property owners' claim for damages under RCW 64.40 is barred because it was not brought within the thirty-day statute of limitations required by RCW 64.40.030. A claim for damages under RCW 64.40 "shall be commenced only within 30 days after all administrative remedies have been exhausted." RCW 64 .40.030; *Smoke v. City of Seattle,* 132 Wn.2d 214, 223, 937 P.2d 186 (1997). The property owners exhausted their administrative remedies, at the latest, when their Land Use Petition was dismissed on November 8, 1996. *Hayes v. City of Seattle,* 131 Wn.2d 706, 715-16, 934 P.2d 1179 (1997). The amended complaint asserting their RCW 64.40 claim was not filed until December 12, 1996, more than 30 days after their administrative remedies were exhausted on November 8, 1996. Strict compliance with RCW 64.40.030 is required. *See R/L Associates, Inc. v. City of Seattle,* 73 Wn. App. 390, 869 P.2d 1091 (1994) (RCW 64.40 claim barred when it was not filed within 30 days after landowner exhausted their administrative remedies).

The fact that the claims raised in the amended complaint relate back to the original pleading under CR 15(c) does not save the property owners' RCW 64.40 claim. When the mandamus action was filed in October 1995, the property owners had not exhausted their administrative remedies, a mandatory prerequisite to a RCW 64.40 claim. *See Macri v. King County,* 126 F.3d 1125, 1130 (9th Cir. 1997) (property owner's claim filed before exhaustion of administrative remedies was not ripe and, therefore,

properly dismissed). The property owners' RCW 64.40 cause of action should have been dismissed as untimely.[18]

III.

Other Defenses to the Property Owners' Damage Claims

The City contends that under the holding of *R/L Associates, Inc. v. City of Seattle,* 113 Wn.2d 402, 780 P.2d 838 (1989), municipalities are not liable for damages for the enforcement of unconstitutional ordinances. In *R/L Associates,* a landlord challenged tenant assistance provisions of a Seattle ordinance and claimed that enforcement of the ordinance was a violation of substantive due process and 42 U.S.C. § 1983.[19] Because the plaintiff did not offer any argument or evidence of a substantive due process violation, the trial court did not find liability under §1983 and on appeal the Court did not consider the claim:

> While R/L pleaded a section 1983 claim, it made no allegation of irrational, or arbitrary or capricious conduct on the part of the City in its denial of R/L's demolition license. Moreover, this issue

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[18] Because of our conclusion that the RCW 64.40 damage claim should have been dismissed, we do not address the parties' other arguments regarding RCW 64.40.

[19] 42 U.S.C. sec.1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, of usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

> was not presented to or considered by the trial court, and will not be considered on appeal.

R/L Associates., 113 Wn.2d at 412.

The City relies on a sentence in the Court's opinion in *R/L Associates* which states that a city "cannot be held liable in damages for the mere enforcement of an unconstitutional or void ordinance in the nature of a police power regulation". *R/L Assocs.*, 113 Wn.2d at 412. But contrary to the City's contention, the Court in *R/L Associates* went on to say that when a 42 U.S.C. § 1983 cause of action is properly pleaded, "[i]t is clear that a municipality may be subject to suit under 42 U.S.C. §1983 where it acts through an ordinance." *R/L Assocs.*, 113 Wn.2d 411-12. The property owners here properly pleaded a cause of action under 42 U.S.C. §1983 in the amended complaint.

While the City concedes that the property owners have a 42 U.S.C. §1983 claim for damages, they argue the property owners are not entitled to damages based independently on their constitutional impairment of contract claim. The property owners contend they are entitled to damages on this claim because this court in *Vine I* in its analysis of the constitutional impairment of contract claim held that a contractual relationship existed between the property owners and the City.

The City cites authority to support its argument that absent an independently pleaded basis for damages, injunctive relief is the sole remedy for unconstitutional impairment of contract. The property owners do not cite any contrary authority. The property owners asserted a breach of contract claim as well as a cause of action for unconstitutional impairment of contract in the mandamus action. Thus, while this court's decision in *Vine I* would

permit an independently asserted claim for breach of contract, the property owners did not reassert their breach of contract claim in their amended complaint and under the caselaw, they have abandoned it.[20] An amended complaint replaces those causes of action asserted in the original complaint. *See Fosmo v. State Dept. of Personnel,* 114 Wn. App. 539, 539-40, 59 P.3d 105 (2002); *Herr v. Herr,* 35 Wn.2d 164, 211 P.2d 710 (1949).

Without citation to the record or authority, the City also argues that the property owners' damages claims should be dismissed as speculative because Snohomish County, not the City, is the permitting authority which has the ultimate authority to approve development projects. Because availability of utilities is a prerequisite for applying for a permit,[21] the trial court properly denied summary judgment on this basis.

The City also contends that the property owners' damages are barred because damages caused by "nominal delay" are not recoverable.[22] But the City and the owners propose different calculations for the delay. The City has not established that the delay here was nominal as a matter of law.

The City also argues that the damage claims should be dismissed due to lack of proximate cause, assumption of risk, and the doctrine of avoidable consequences. With respect to all three theories, the City essentially argues

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[20] CP 510-512.

[21] *Vine,* 98 Wn. App. at 545.

[22] The City contends that the delay is only approximately six months, the time between the City's denial of the variance and the settlement agreement.

that any damages were caused by the property owners' decision to petition for annexation by Arlington. This issue was considered and rejected in *Vine I*:

> we reject Marysville's argument that these property owners 'did it to themselves,' so to speak, by petitioning for annexation to Arlington rather than to Marysville, with full knowledge of the provisions of MMC 14.32.040.

Vine I, 98 Wn. App. at 552.

The trial court correctly concluded that the City is precluded by *Vine I* from arguing that the property owners' damages were caused by their decision to annex to the City of Arlington.

ATTORNEY FEES

The City seeks attorney fees under RCW 64.40.020(2) which states, in part: "The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees." Because we reverse and dismiss the property owners' RCW 64.40 damages claim, on remand the City may be entitled to fees under this statutory provision.[23]

CONCLUSION

In *Vine I*, we concluded that on remand the jury should be instructed that liability against the City is established for its denial of the property owners' requests

[23] If the trial court decides to award fees to the City under RCW 64.40.020(2) for attorney fees related to the RCW 64.40 claim, it should require the City to segregate.

for letters of commitment for utilities and variances. The trial court correctly concluded likewise in its order on summary judgment. The property owners are entitled to proceed on their claim for damages under 42 U.S.C. §1983. We affirm the trial court's December 14, 2001 order in all respects, except to reverse the denial of summary judgment on the RCW 64.40 claim and the common law breach of contract claim. We adhere to our decision in *Vine I* and remand for a trial on damages.

/s/ Schindler, J.

WE CONCUR:

/s/ Appelwick, J. /s/ Ellington, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

VINE STREET COMMERCIAL PARTNERSHIP, a Washington General Partnership; SMOKEY POINT PROPERTIES, a Washington General partnership consisting of RALPH MONTY and MARYANN MONTY, husband and wife; HENRY R. STAMPF and CINDY STAMPF, husband and wife; J. ROBERT SANDSTROM and KARELENE SANDSTROM, husband and wife; and RON HUITGER, a single man,	No. 50009-1-I
Respondents,	DIVISION ONE
v.	UNPUBLISHED OPINION
THE CITY OF MARYSVILLE, a Washington Municipal Corporation,	FILED: Sep 02 2003
Appellant.	

Appellant, City of Marysville, filed a motion for reconsideration of the opinion filed September 2, 2003. A majority of the panel has determined this motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DATED this 2nd day of October 2003.

FOR THE PANEL:

/s/ Schindler, J
Presiding Judge

[No. 42206-5-I. Division One. December 20, 1999.]

VINE STREET COMMERCIAL PARTNERSHIP, ET AL., *Appellants*, v. THE CITY OF MARYSVILLE, *Respondent*.

William Boyd Foster III of *Hutchison, Foster & Weigelt*; and *Dennis W. Jordan*, for appellants.

Grant Kevin Weed of *Keithly, Weed & Graafstra*; and *Michael Charles Walter* of *Keating, Bucklin & McCormack, P.S.*, for respondent.

KENNEDY, C.J. – Vine Street Commercial Partnership and Smokey Point Properties (the property owners) appeal a summary judgment ruling by the Snohomish County Superior Court that dismissed their claims for damages arising from the City of Marysville's denial of water and sewer utility service to their properties – which are located outside the city limits but within a utility local improvement district (ULID) formed in 1973 for the purpose of constructing sewer mains. After the ULID was formed and the property owners had fully paid their respective assessments for the sewer mains, Marysville established a rural utility services area (RUSA) and enacted MARYSVILLE MUNICIPAL CODE (MMC) 14.32.040, which requires the owner of any property located outside the city limits to sign a petition for annexation by Marysville in order to obtain utility services. But the property owners petitioned for annexation by the City of Arlington, instead of Marysville. As a result, Marysville refused to grant their applications for utility services. In the course of settling various law suits preceding this one, the property owners ultimately obtained utility services from Marysville; in the present suit they seek damages arising from Marysville's allegedly "wrongful" delay in provided [sic] the services, claiming (among other things) that MMC 14.32.040 does not

apply to them, and if it does that it violates the prohibition against impairment of contracts contained in article 1, section 23 of the Washington Constitution. We conclude that the criterion contained in MMC 14.32.040 relating to consent to annexation does apply to these property owners – but in violation of the constitutional prohibition against impairment of contracts – and we reverse and remand for a trial on damages or such other disposition as shall be consistent with this opinion.[1]

FACTS

In 1973, Marysville formed ULID No. 56 to improve real properties in parts of Snohomish County lying outside the city limits by constructing sewer mains, lift stations, and appurtenances. It is undisputed that the property owners' lands lie within the boundaries of ULID No. 56 and that they or their predecessors have paid the entire amount of their respective shares of the ULID assessments for the sewer improvements. When ULID No. 56 was formed, there was no requirement that persons outside the city limits desiring to connect to city water and sewer systems sign a statement of intention to annex.

In 1982, Marysville established a RUSA and adopted "rules, regulations and criteria for entering into contracts for utility services therein and the management and control of said services." Clerk's Papers at 911 (Ordinance No. 1242). The boundaries of the RUSA encompassed ULID No. 56. The first section of the RUSA ordinance provides:

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[1] This ruling makes it unnecessary to address the property owners' remaining claims raised in this appeal.

> RUSA shall not be construed as establishing the city as a "public utility" for properties located therein, nor shall it be construed as establishing express or implied rights for any property to connect to the city's utility system. All utility connections in rural areas are on the basis of special contracts with the city, and such contracts shall be granted or denied, as a governmental function of the city pursuant to provisions of this chapter.

MMC 14.32.010.

Later that same year, Marysville enacted MMC 14.32.040, providing in pertinent part:

> The city is under no obligation to provide water and sewer utility services to any properties located outside of the city limits, with the exception of those already under contract with the city privately or through a utility local improvement district. However, any application for such services within the RUSA boundaries shall be reviewed and granted, or denied, in the city's discretion, pursuant to the following criteria:
>
> (1) Priority shall be given to properties located within an established ULID and properties having some preexisting contractual relationship with the city for utilities. . . .
>
> (2) A property applying for a utility connection must be suitable for ultimate annexation to the city based upon its proximity to the city[.] . . . The owner of any property granted utility connections shall sign a petition to annex the property to the city. . . .
>
> . . . .

> (4) Properties located outside the city limits of Marysville seeking city sewer service shall also be required to connect to water service from the city. Any variation from this requirement shall be processed pursuant to Section 14.01.040.

MMC 14.32.050(3) provides: "Utility service to properties within a ULID, or to other properties with preexisting contractual commitments from the city, is contingent upon compliance with subsections (1) through (5) of Section 14.32.040 [but the remaining subsections (6) through (10)] shall not apply to such properties."

The property owners signed petitions consenting that their properties be annexed to the City of Arlington, rather than Marysville. Arlington subsequently approved the petitions. Meanwhile, the property owners applied to Marysville for utility commitment letters – which Snohomish County requires before it will issue a building permit. In September 1995, Marysville rejected the utility applications because the property owners had not executed "either an annexation covenant or annexation petition in favor of Marysville[.]" Clerk's Papers at 207; 234. In late 1995 and early 1996, the property owners applied to Marysville for utility variances for water and sewer connections. Marysville likewise rejected these applications, stating: "Because of the applicant's decision to sign a petition to annex to another city, the applicant is unable to execute a valid annexation covenant to Marysville as required by MMC 14.32.040(2)." Clerk's Papers at 451, 457.

Meanwhile, the property owners filed a series of lawsuits. One was dismissed because the property owners had not exhausted their administrative remedies; another was dismissed as moot after the property owners ultimately

received water and sewer utility services from Marysville. In the current lawsuit, the property owners seek "damages arising as a result of [Marysville]'s wrongful denial of the utility letters requested and the wrongful denial of the variances requested." Clerk's Papers at 33. The property owners contend that the delays they experienced in obtaining utility commitment letters, leaving them unable to apply for county building permits, resulted in serious economic damages.

The property owners moved for summary judgment as to liability, arguing that they were entitled to damages under impairment of contract and various other theories. Marysville also moved for summary judgment, contending that it had the authority to condition water and sewer utility services outside its city limits on the property owners' consent to the annexation of their properties. The trial court granted Marysville's motion, dismissing the property owners' claims with prejudice. This appeal followed.

DISCUSSION

The property owners first claim that MMC 14.32.040 does not apply to them because the opening paragraph of the ordinance exempts those already under contract with Marysville for utility services, privately or through a ULID, from the criteria that follow – including the requirement that they sign a petition to annex to Marysville. We disagree. The opening paragraph recognizes the contractual obligation of Marysville to those already under contract, privately or through a ULID, but nevertheless purports to make those same properties subject to the criteria that follow. Moreover, any ambiguity in this regard

is clarified by MMC 14.32.050(3), which specifies that utility services to properties within a ULID, or to other properties with preexisting contractual commitments are contingent upon compliance with the first five criteria of MMC 14.32.040 – including the requirement that an annexation petition or covenant be signed.

Thus, the pertinent inquiry is not whether Marysville's legislative body intended MMC 14.32.040 to apply to these property owners; clearly, that was the legislative intent. Rather, the pertinent inquiry is whether retroactive enforcement of the consent-to-annexation requirement contained in the ordinance impairs the obligation of a preexisting contract between the property owners and Marysville in violation of article 1, section 23 of the Washington Constitution.

Article 1, section 23 provides: "No . . . law impairing the obligations of contracts shall ever be passed." WASH. CONST. art. 1, § 23. This prohibition applies to any form of legislative action. *Washington Fed'n of State Employees v. State,* 127 Wn.2d 544, 560, 901 P.2d 1028 (1995). "The test for legislative impairment of public contracts is more exacting than the test for legislative impairment of private contracts." *Caritas Servs., Inc. v. Department of Soc. & Health Servs.,* 123 Wn.2d 391, 402-03, 869 P.2d 28 (1994) (footnote omitted).

Analysis of impairment of public contracts claims requires three inquiries: (1) Does a contractual relationship exist? (2) If so, does the legislation substantially impair the contractual relationship? (3) If it does and the State has impaired its own contract, was the impairment reasonable and necessary to serve a legitimate legislative

purpose? *Caritas,* 123 Wn.2d at 403 (citing *Carlstrom v. State,* 103 Wn.2d 391, 394-97, 694 P.2d 1 (1985)).

Contractual Relationship

A city has no duty to extend utility services beyond its borders. *Yakima County (W. Valley) Fire Protection Dist. No. 12 v. City of Yakima,* 122 Wn.2d 371, 381, 858 P.2d 245 (1993). But a city may contract to provide such services. *See* RCW 35.21.210, .67.310, .91.020, .92.010; *see also* RCW 35.43.075 (explaining that a petition for formation of LID or ULID outside of city limits may be denied by majority vote of legislative authority of city or town); *People for Preservation & Dev. of Five Mile Prairie v. City of Spokane,* 51 Wn. App. 816, 821, 755 P.2d 836 (1988) (providing that a city is under no obligation to furnish water or sewer services outside corporate limits; if it elects to do so, relationship is purely contractual); *Brookens v. City of Yakima,* 15 Wn. App. 464, 465-66, 550 P.2d 30 (1976) (explaining that power to supply water beyond corporate limits is permissive; supply is a matter of contract between municipality and property owners).

Marysville argues that a ULID is not a contract; rather it is "purely a mechanism for financing the infrastructure, and nothing more." Resp't's Br. at 26. This argument begs the question of why landowners petition for the formation of ULIDs in order to finance the infrastructure – they do so in the expectation that their properties will be specially benefited by the improvement, for which they will be assessed in direct proportion to the amount of the special benefit that each of them will enjoy. *See generally* RCW 35.43.120 (authorizing the initiation of any local improvement by petition of owners of property aggregating

a majority of the area within the proposed district, stating that actual assessments may vary from assessment estimates so long as they do not exceed a figure equal to the increased true and fair value the improvement adds to the property); RCW 35.44.010 (requiring the cost and expense of improvement to be assessed upon all the property specially benefited by the local improvement in accordance with the special benefits conferred thereon); RCW 35.50.010 (explaining that a charge assessed upon the respective property in the assessment roll becomes a lien against the property that shall be paramount to all other liens except a lien for general taxes).[2]

It begs reason that a property owner might petition for the formation of a ULID knowing that the property will be assessed for the special benefit, and that the assessment will become a lien against the property, and then pay that assessment in full, with any other expectation than that when the utility becomes operational he or she will be able to hook up to it – thereby realizing the full value of the special benefit. It is true that a ULID is a financing mechanism; the same can be said of a home-improvement loan secured by a mortgage or deed of trust encumbering the property to be improved. In both instances, the property owner incurs a debt in the expectation that the property will be improved and thereby benefited, in exchange for the financial commitment. To label a ULID a financing mechanism does not answer the question of whether property owners whose property is assessed

[2] Although various statutes relating to LIDs and ULIDs have been amended since the formation of ULID No. 56, the overall statutory scheme is unchanged and the amendments do not affect our opinion. For convenience, we cite to current statutes.

obtain enforceable rights to receive the special benefits for which they have paid.

Our Supreme Court has said:

> "[T]he only legal basis for a special assessment against real estate is a finding that the improvement for which the assessment is levied will result in some special benefit to the property assessed, and the assessment cannot exceed in amount the special benefit to the property[.]"

Hargreaves v. Mukilteo Water Dist., 43 Wn.2d 326, 332, 261 P.2d 122 (1953) (quoting *In re Sixth Ave.*, 155 Wash. 459, 471, 284 P. 738 (1930)). This is because "'the exaction from the owner of private property of the cost of a public improvement in substantial *excess* of the special benefits accruing to him is, *to the extent of such excess,* a taking, under the guise of taxation, of private property for public use without compensation.'" *Id.* (quoting *Village of Norwood v. Baker,* 172 U.S. 269, 279, 19 S. Ct. 187, 43 L. Ed. 443 (1898)).

We conclude that property owners who petition for the formation of a ULID, whose properties are then assessed for the special benefits thereby accruing, and who subsequently pay their assessments in full, are entitled to receive the special benefits for which they have paid.[3] In

[3] Neither the parties nor the court have found Washington cases directly in point on this issue. Other jurisdictions have dealt with municipalities attempting to deny services to property owners whose properties had been assessed for utility improvements. *See City of El Cajon v. Heath,* 86 Cal. App. 2d 530, 196 P.2d 81, 83 (1948) (holding that property owner who paid assessment for cost of system before property was annexed to city had beneficial interest in improvements that could not be taken by annexation of part of the sewer improvement district, and that city could impose reasonable regulations with respect

(Continued on following page)

this respect, their relationship with the governing body that formed the ULID is indistinguishable from the relationship between parties who enter into individual contracts with the governing body for utility services, as was the case in *Brookens,* 15 Wn. App. 464, and in *Five Mile Prairie,* 51 Wn. App. 816. In both situations, there is a contract in the usual sense of that word, that is, "'an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts.'" *Caritas,* 123 Wn.2d at 403 (citations omitted).

Substantial Impairment

"A contract is impaired by a statute [that] alters its terms, imposes new conditions or lessens its value." *Id.* at 404. "Parties are generally deemed to contract in reliance on existing law." *Id.* at 405. Here, when ULID No. 56 was formed, Marysville had no law requiring annexation covenants from the property owners whose property was assessed to pay for the construction of the sewer improvements. MMC 14.32.040 retroactively imposed the annexation covenant agreement after the property owners had performed by paying their assessments. Marysville, although having variance provisions, which could have

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to use of city sewer system including reasonable charges for the service rendered but could not arbitrarily deny property owner the use of the system); *Catholic Foreign Mission Soc'y of Am. v. Village of Glen Ellyn,* 339 Ill. App. 565, 90 N.E.2d 653, 655-57 (1950) (concluding that mandamus will lie to require municipality to connect property to sewer system where property had been assessed for the improvement and assessment had been paid, and that property could not be assessed unless benefited by present use of sewer or future use of such a nature that owner can enforce his rights and thereby secure benefits). These cases provide persuasive support for our ruling.

addressed the problem, refused the property owners' variance applications and (initially) enforced the ordinance, thereby refusing the property owners their beneficial interest in the improvements for which they had paid. We conclude that the impairment was substantial.

Impairment Reasonably Necessary

Even a substantial impairment of a public contract may be constitutional if it was necessary to serve a legitimate public purpose. *Caritas,* 123 Wn.2d at 411. We have no quarrel with the proposition that Marysville's RUSA serves a legitimate public purpose. Indeed, we have no quarrel with the general proposition that a municipality may condition providing utility services to property lying outside its city limits upon the property owners signing annexation covenants – provided that such a requirement is in place when the contract is formed. *See Five Mile Prairie,* 51 Wn. App. at 820 (concluding that property owners outside city limits made legal and binding promise to support annexation when they signed water service agreements with city); *see also Fire Protection Dist.,* 122 Wn.2d at 384-85 (concluding that outside utility agreements containing requirement that extraterritorial landowner sign any annexation petition in the future was valid waiver of future rights in that state statute setting out requirements for annexation under petition method was in existence at time landowners signed the outside utility agreements).

But here, the annexation covenant requirement was not in existence when the property owners petitioned for the ULID, nor when the ULID was formed. Moreover, Marysville has since provided water and sewer service to

the property owners, notwithstanding their petitions for annexation to Arlington, making it difficult for this court to conclude that retroactive enforcement of the annexation covenant requirement against these particular landowners in derogation of the beneficial interests for which they had long since paid was reasonably necessary to serve a legitimate public purpose.

Marysville contends that if a contract right was impaired, it was only a right to sewer service and not to water service, in that ULID No. 56 dealt only with sewer lines and appurtenances. But MMC 14.32.040(4) requires that, absent a variance, properties located outside the city limits seeking sewer services shall also be required to connect to water service from Marysville. Marysville's position is not persuasive. To set up a requirement for water service as a condition of sewer service and then to refuse the property owners water service or a variance from that requirement leads to the same result – impairment of the vested rights arising from the property owners' participation in the ULID for the sewer system.

Marysville mischaracterizes the property owners' position as one that demands an "unconditional" right to sewer services as a result of the ULID, and argues that nothing in the statutes authorizing formation of LIDs and ULIDs remotely suggests that a municipality cannot impose reasonable conditions on connections to utility systems by participants in a ULID. The property owners do not contend that their right to connection is "unconditional." They admit, and we agree, that a city "'undoubtedly has the authority to require that [they] comply with reasonable regulations with respect to the use of the city sewer system, including the payment of reasonable charges for the service rendered, but the city should not be

permitted to arbitrarily refuse [them] the right to the use of the system.'" Appellant's Br. at 16 (quoting *City of El Cajon v. Heath,* 86 Cal. App. 2d 530, 196 P.2d 81, 83 (1948)). Nothing in our ruling limits a municipality's ability to impose reasonable regulations relating to cost of service or to public health and safety issues relating to the provision of utility services.

We also reject Marysville's contention that our ruling is tantamount to prohibiting any and all changes to zoning regulations that might be adopted following formation of a ULID. Moreover, Marysville is undoubtedly aware of laws protecting "grandfathered" non-conforming uses following changes in zoning regulations – not an unfamiliar concept in zoning law, and one that is consistent with our ruling in the instant case in any event.

Finally, we reject Marysville's argument that these property owners "did it to themselves," so to speak, by petitioning for annexation to Arlington rather than to Marysville, with full knowledge of the provisions of MMC 14.32.040. Whether the property owners were aware of the ordinance is not the issue; the issue is the authority of Marysville to impose retroactive conditions unrelated to the cost of providing utility services, and unrelated to the capacity of the system to serve the ULID participants whose properties were assessed to pay for construction of the system, and who did pay for the construction of the system. We have applied constitutional impairment analysis because that is the way the parties briefed the dispositive issue – but it is likely that a takings analysis would have led to the same result. Indeed, the constitutional underpinning of our ruling is simply that "'the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special

benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.'" *Hargreaves,* 43 Wn.2d at 331-32 (emphasis omitted) (quoting *Village of Norwood,* 172 U.S. at 279). What a municipality cannot do in the formation of a ULID it also cannot do after the fact – it cannot, without paying compensation, retroactively impose conditions that effectively deprive property owners of the special benefits for which they have become obligated by assessments against their properties, after these assessments are paid in full.

We reverse the summary judgment that was granted to Marysville and remand for a trial on damages or such other disposition as shall be consistent with this opinion.[4]

WEBSTER and ELLINGTON, JJ., concur.

Reconsideration denied January 28, 2000.

Review denied at 141 Wn.2d 1006 (2000).

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[4] We decline Marysville's invitation to review this case on other grounds raised by Marysville's cross-motion for summary judgment below, which was not ruled upon by the trial court and which is not adequately briefed for this appeal. We express no opinion as to the appropriate disposition of those issues.

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

VINE STREET COMMERCIAL PARTNERSHIP, a Washington General Partnership; SMOKEY POINT PROPERTIES, a Washington General Partnership consisting of RALPH MONTY and MARYANN MONTY, husband and wife, HENRY R. STAMPF and CINDY STAMPF, husband and wife, J. ROBERT SANDSTROM and KARLENE SANDSTROM, husband and wife, and RON HUITGER, a single man, Appellants, v. THE CITY OF MARYSVILLE, a Washington municipal corporation, Respondent.	NO. 42206-5-I ORDER DENYING MOTION FOR RECONSIDERATION (Filed Jan. 28, 2000)

The court having received and considered respondent's Motion for Reconsideration which was filed on January 3, 2000, and the panel having determined that the motion should be denied, Now Therefore, It Is Hereby

ORDERED that respondent's Motion for Reconsideration is denied.

Dated this 28th day of January, 2000.

FOR THE COURT: /s/ Kennedy, C.J.
Presiding Judge

HONORABLE GEORGE N. BOWDEN
Noted for: Friday, December 14, 2001
at 1:00 p.m.

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND
FOR THE COUNTY OF SNOHOMISH

VINE STREET COMMERCIAL PARTNERSHIP, a Washington general partnership, et al., Plaintiffs, v. THE CITY OF MARYSVILLE, a Washington municipal corporation, Defendant.	No. 95-2-07655-4 **ORDER ON MOTIONS FOR SUMMARY JUDGMENT** (Filed Dec. 14, 2001)

I. BASES OF THE ORDER

THIS MATTER CAME ON regularly for hearing upon the City's Motion for Summary Judgment dated January 29, 2001, the City's Second Motion for Summary Judgment dated July 2, 2001, the City's Third Motion for Summary Judgment dated July 2, 2001 and Plaintiffs' Motion for Summary Judgment dated June 7, 2001. Plaintiff, Vine Street Commercial Partnership, appeared by and through its attorney of record, William B. Foster of Hutchison, Foster & Weigelt, and Plaintiffs Smokey Point Properties, et al., appeared by and through their attorney of record, Dennis A. Jordan and Dennis A. Jordan & Associates, Inc., P.S. Defendant

City of Marysville appeared by and through its associated attorneys of record, Michael C. Walter of Keating, Bucklin & McCormack, Inc., P.S. and Grant K. Weed of Keithly, Weed Graafstra & Benson, Inc., P.S.

THE COURT CONSIDERED THE FOLLOWING PLEADINGS, a memoranda and evidentiary materials:

Plaintiff's Motion for Summary Judgment

1. Plaintiff's Motion for Summary Judgment (June 7, 2001);

2. Defendant City of Marysville's Opposition to Plaintiff's Motion for Summary Judgment (July 26, 2001);

3. Plaintiffs' Reply to Defendant's Response to Motions for Summary Judgment (August 22, 2001);

The City's Initial Motion for Summary Judgment

4. Defendant City of Marysville's Motion for Summary Judgment (January 29, 2001);

5. Plaintiffs' Response to Defendant's Motion for Summary Judgment (February 22, 2001);

6. City of Marysville's Reply Memorandum in Support of Motion for Summary Judgment (February 28, 2001);

The City's Second Motion for Summary Judgment

7. Defendant City of Marysville's ***Second*** Motion for Summary Judgment (July 2, 2001);

8. Plaintiff's Response to Defendant's ***Second*** Motion for Summary Judgment (July 27, 2001);

9. Marysville's Reply Re: ***Second*** Summary Judgment Motion (August 21, 2001);

The City's Motion for Summary Judgment

10. Defendant Marysville's ***Third*** Motion for Summary Judgment (July 2, 2001);

11. Plaintiffs' Response to Defendant's ***Third*** Motion for Summary Judgment (July 27, 2001);

12. Marysville's Reply Re: ***Third*** Summary Judgment Motion (August 21, 2001); and

Additional Pleadings

13. All of the pleadings and court files under Snohomish County Cause Nos. 95-2-07655-4 and 96-2-02947-3.

Additional Evidence

THE COURT ALSO CONSIDERED the following affidavits, declarations and evidentiary material, including documents appended to each:

1. Declaration of Stephanie E. Croll in Support of the City's Motion for Summary Judgment (January 26, 2001) and attached exhibits;

2. Declaration of Phillip E. Dexter in Support of the City's Motion for Summary Judgment (January 5, 2001) and attached exhibits;

3. Declaration of Mary Swenson in Support of the City's Motion for Summary Judgment (January 16, 2001) and attached exhibits;

4. Declaration of Carol C. Shorpp in Support of the City of Marysville's Motion for Summary Judgment (January 5, 2001) and attached exhibits;

5. Declaration of Michael C. Walter (June 29, 2001) and attached exhibits [In Support of Marysville's ***Second*** Motion for Summary Judgment];

6. Declaration of Grant K. Weed (June 29, 2001) and attached exhibits [In Support of Marysville's ***Second*** Motion for Summary Judgment];

7. Declaration of Mary Swenson (June 28, 2001) [In Support of Marysville's ***Second*** Motion for Summary Judgment];

8. Declaration of Grant K. Weed (September 6, 1996) and attached exhibits [Under Cause No. 96-2-02947-3];

9. Declaration of David Zabell in Opposition to Petition for Writ of Mandamus (October 31, 1995) and attached exhibits [Under Cause No. 95-2-07655-4];

10. Declaration of David Weiser in Response to Petition for Writ of Mandamus (October 31, 1995) and attached exhibits [Under Cause No. 95-2-07655-4];

11. Declaration of Gloria Hirashima in Support of City of Marysville's Motion for Summary Judgment (June 9, 1997) and attached exhibits [Under Cause No. 96-2-02947-3];

12. Declaration of Larry Wade in Support of City of Marysville's Motion for Summary Judgment (June 12, 1997) [Under Cause No. 96-2-02947-3];

13. Declaration of Ken Hall in Support of City of Marysville's Motion for Summary Judgment (June 13,

1997) and attached exhibit [Under Cause No. 96-2-02947-3];

14. Declaration of David Weiser in Support of Motion to Dismiss (October 7, 1996) and attached exhibits [Under Cause No. 96-2-02947-3];

15. Supplemental Declaration of David Weiser in Support of Motion to Dismiss (October 24, 1996) and attached exhibits [Under Cause No. 96-2-02947-3];

16. Declaration of Michael C. Walter in Support of Motion to Dismiss (October 29, 1996) and attached exhibits [Under Cause No. 96-2-092847-3];

17. Declaration of Ralph Monty (July 26, 2001) and attached exhibits;

18. Declaration of William B. Foster (July 27, 2001);

19. Declaration of J. Brent McKinley (undated and unsigned);

20. Declaration of Michael C. Walter in Support of Marysville's First Motion for Summary Judgment (August 7, 2001) and attached exhibit; and

21. Declaration of Dennis Jordan in Opposition to City of Marysville's First Motion for Summary Judgment (September 13, 2001).

THE COURT HEARD ARGUMENT by counsel for Plaintiffs and Defendant on September 28, 2001, and considered that argument in addition to and in conjunction with the foregoing pleadings, memoranda and evidentiary materials.

II. ORDER

BASED ON THE FOREGOING, the Court hereby orders as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Summary Judgment on the issue of the City's liability for Plaintiffs' damages for breach of contract dated June 7, 2001 is GRANTED. In conjunction therewith –

(A) Plaintiffs' request to dismiss the City's affirmative defense to Plaintiffs' claim for damages pursuant to the Business Judgment Rule is GRANTED, and the City's affirmative defense pursuant to the Business Judgment Rule is hereby DISMISSED;

(B) Plaintiffs' request to dismiss the City's affirmative defense that the City is immune from damages under the doctrine of discretionary governmental immunity is GRANTED and the City's affirmative defense of discretionary governmental immunity is hereby DISMISSED.

(C) Plaintiffs' request to dismiss the City's affirmative defense of the statute of limitations in regard to Plaintiffs' claims for damages pursuant to RCW Ch. 64.40 and 42 U.S.C. § 1983 is GRANTED and the City's affirmative defense of the statute of limitations as to Plaintiffs' RCW Ch. 64.40 and 42 U.S.C. § 1983 claims is hereby DISMISSED;

(D) Plaintiffs' request to dismiss the City's affirmative defense that the Plaintiffs are barred from seeking damages under *Seattle v. R/L Associates* is granted and the City's affirmative defense that Plaintiffs are barred from seeking damages under the holding of *Seattle v. R/L Associates* is hereby DISMISSED; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City's Motion for Summary Judgment dated January 29, 2001 shall be, and is hereby, DENIED;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City's Second Motion for Summary Judgment dated July 2, 2001, shall be, and is hereby, DENIED;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City's Third Motion for Summary Judgment dated July 2, 2001, shall be, and is hereby, DENIED;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall be obligated to prove the scope of their damages and whether the City's refusal to provide the utility letter was the proximate cause of those damages; Provided, However, that the City shall not be entitled to assert to argue as a defense at trial that the damages sustained by the Plaintiffs were self inflicted or invited by them by their voluntary act of their petitioning for annexation to the City of Arlington; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall be entitled to a jury instruction at the time of trial that the City's denial of utility services to the Plaintiffs was unconstitutional and unlawful.

DONE IN OPEN COURT on this 14th day of December, 2001.

/s/ George N. Bowden
HONORABLE GEORGE N. BOWDEN

PRESENTED BY:

/s/ William Foster
William B. Foster,
WSBA #8270
Attorney for Plaintiff
Vine Street

/s/ Dennis Jordan
Dennis Jordan,
WSBA #4904
Attorney for Plaintiff
Smokey Point Properties,
et al.

COPY RECEIVED, APPROVED FOR ENTRY
& NOTICE OF PRESENTATION WAIVED:

/s/ Michael C. Walter
Michael C. Walter,
WSBA #15044
Associated Counsel for
Defendant City of
Marysville

/s/ Grant K. Weed
Grant K. Weed,
WSBA #11243
Associated Counsel for
Defendant City of
Marysville

THE HONORABLE GEORGE BOWDEN
Noted for: Friday, December 14, 2001
at 1:00 p.m.

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

VINE STREET COMMERCIAL PARTNERSHIP, a Washington General Partnership, et al.,

Plaintiffs,

v.

THE CITY OF MARYSVILLE, a Washington municipal corporation,

Defendant.

No. 95-2-07655-4

ORDER GRANTING THE CITY'S RULE 54(b) MOTION AND WRITTEN FINDINGS

ORIGINAL

INTRODUCTION

This matter having come on for hearing this 14th day of December, 2001 on the Motion of the City under CR 54(b) to designate the Court's Order on Motions for Summary Judgment as "final," the Court having considered the declaration of Michael C. Walter dated December 6, 2001, the declaration of Grant K. Weed dated December 6, 2001, the Motion of City under Rule 54(b) For Entry of Final Judgment and to Enter Written Findings, and the following responsive materials from Plaintiffs and reply materials from the City: Plaintiffs' Response to Defendant's CR 54(b) Motion dated December 12, 2001 and the City's Reply Memorandum in Support of Rule 54(b) Motion, dated December 13, 2001, and Supplemental Declaration of Michael C. Walter in Support of CR 54(b) Certification, dated December 13, 2001, and the Court

having considered the records and files herein and having no reason for delay, the Court hereby finds that the Motion of City Under Rule 54(b) for Entry of Final Judgment and to Enter Written Findings should be GRANTED and the Court's Order on Motions for Summary Judgment dated December 14, 2001 is a final, immediately appealable order and there is no just reason for delay of appeal of this Order.

In making this determination, the Court hereby enters the following findings:

FINDINGS

The Parties' Summary Judgment Motions.

1. The City filed Defendant City of Marysville's Motion for Summary Judgment on or about January 29, 2001.

2. The City filed Defendant City of Marysville's Second Motion for Summary Judgment on or about July 3, 2001.

3. The City filed Defendant City of Marysville's Third Motion for Summary Judgment on or about July 3, 2001.

4. The Plaintiffs filed their Motion for Summary Judgment on or about June 7, 2001.

5. All three of the City's Motions for Summary Judgment were consolidated for hearing, along with Plaintiffs' Motions for Summary Judgment, and set for hearing on September 28, 2001.

The Court's Order on Motions for Summary Judgment.

6. In an oral decision rendered September 28, 2001, the Court denied all three of the City's Motions for Summary Judgment and granted in part and denied in part the Plaintiffs' Motions for Summary Judgment.

7. The Court entered a written Order on Motions for Summary Judgment dated December 14, 2001 (the "Order).

Order Re: City's First Motion for Summary Judgment.

8. By virtue of the Order, the trial court denied Defendant's First Motion for Summary Judgment, which asked for dismissal of Plaintiffs' lawsuit based on the fact that none of the Plaintiffs, nor their predecessors in interest, had paid any of the assessments levied against them for ULID No. 1 on or before the date that the City's annexation covenant requirement (Ord. No. 887) became effective.

Order Re: City's Second Summary Judgment Motion.

9. By virtue of the Order, the trial court denied in its entirety the City's Second Motion for Summary Judgment, which set forth the following independent bases for summary judgment:

i. Plaintiffs' lawsuit should be dismissed based on lack of jurisdiction because Plaintiffs never filed a Summons with the Court when they filed their Amended Complaint.

ii. Plaintiffs' lawsuit should be dismissed based on lack of jurisdiction because Plaintiffs have never served a Summons on the City for their Amended Complaint.

iii. Plaintiffs' lawsuit should be dismissed on the basis that Plaintiffs never served the City with their Amended Complaint for Damages.

iv. Plaintiffs' damage claims asserted under 42 U.S.C. § 1983 are barred by the three-year statute of limitations, which began to run either September 1, 1995 or March 25, 1996, and has never been tolled based on Plaintiffs' failure to serve the City with their Amended Complaint.

v. Plaintiffs' claims under RCW Ch. 64.40 are barred by the 30-day statute of limitations, which began running on November 8, 1996, the date Plaintiffs' LUPA action was dismissed, and Plaintiffs did not file their Amended Complaint with the Court until December 12, 1996, more than 30 days later.

vi. Plaintiffs' damage claims under 42 U.S.C. § 1983 and RCW Ch. 64.40 do not relate back under CR 15(c) to the commencement of Plaintiffs' original mandamus action.

Order Re: City's Third Summary Judgment Motion.

10. By virtue of the Order, the trial court denied in its entirety the City's Third Motion for Summary Judgment, which set forth the following independent bases for summary judgment:

i. Plaintiffs' lawsuit should be dismissed because the City's acts and/or omissions were not the proximate cause of Plaintiffs' alleged damages.

ii. Plaintiffs' damage claims should be dismissed because the Plaintiffs' alleged damages are speculative; and/or barred by the doctrine of avoidable consequences; and/or barred by assumption of the risk.

iii. Plaintiffs' state tort damage claims (see, Plaintiffs' Amended Complaint for Damages 5.1, 5.4, 5.7 and 5.8) are barred by the doctrine of discretionary governmental immunity; and/or the doctrine of legislative immunity; and/or the doctrine of quasi-judicial immunity.

iv. Plaintiffs' claims for damages against the City are barred by the holding in *R/L Associates v. Seattle* which holds that a City cannot be held liable in damages for the enforcement of a validly passed ordinance in the nature of a police regulation which later is determined by the Court to be unconstitutional and/or void.

v. Plaintiffs are not entitled to damages based on a de-minimums delay in issuance of a permit and all Plaintiffs' damage claims should be dismissed, including those asserted under RCW Ch. 64.40 and 42 U.S.C. § 1983.

vi. Plaintiffs' claims under RCW Ch. 64.40 should be dismissed as Plaintiffs' applications for utility commitment letters do not meet the statutory definition of a "permit" application.

vii. Plaintiffs' claims under RCW Ch. 64.40 should be dismissed for failure to meet the statutory definition of a governmental "act".

viii. Plaintiffs' RCW Ch. 64.40 claim is barred by discretionary governmental immunity.

ix. Plaintiffs' independent cause of action for damages for violation of the Public Water System Coordination Act, Ch. 7.116 RCW, should be dismissed.

x. Plaintiffs are not entitled to state a claim for damages based solely on proof of a claim for unconstitutional impairment of a contract right, as the sole remedy for unconstitutional impairment of a contract right is injunctive/declaratory relief.

Order Re: Plaintiffs' Summary Judgment Motion.

11. By virtue of the Order, the Court granted in part Plaintiffs' Motions for Summary Judgment as follows:

i. The City's affirmative defense of the Business Judgment Rule was stricken;

ii. The City's affirmative defense of discretionary governmental immunity was stricken;

iii. The City's affirmative defense of the statute of limitations in regard to Plaintiffs' claims pursuant to RCW Ch. 64.40 and 42 U.S.C. § 1983 was stricken; and

iv. The City's affirmative defense that Plaintiffs' claims are barred under the holding of *Seattle v. R/L Associates* was stricken.

No Just Reason for Delay.

12. The Court finds that there is no just reason for delay and the record shows that there is danger of hardship or injustice that will only be alleviated by allowing an

immediate appeal of the Court's denial of the City's above-listed Motions for Summary Judgment and granting in part of the Plaintiffs' Motions for Summary Judgment.

13. In determining that there is no just reason for delay of an immediate appeal, the Court has considered the declarations of Michael C. Walter and Grant Weed, and the Court finds:

a. This case involves multiple claims by the plaintiffs.

b. The issues in the Order are separate and distinct from the remaining, unadjudicated claims. Additionally, all issues for which finality is sought are based on pure questions of law. No facts are in dispute.

c. The issues for which the City seeks immediate appeal are, in part, issues of first impression in the Washington courts. Immediate appellate review is necessary to resolve these first impression issues to avoid a potentially futile and wasteful jury trial.

d. By pursuit of an appeal, needed clarity will be brought to the legal issues in this case which will work to preclude and alleviate the hearing of this case on a piecemeal basis. The Court additionally finds that an immediate appeal will provide guidance to the trial court and may reduce the risk of re-trial.

e. Some of the issues for which immediate appeal is sought, and for which immediate appeal is appropriate, involve constitutional questions and claims which are particularly appropriate for appellate review at this time. Other issues involve significant matters of the Court's jurisdiction and the entitlement to damages relief for an unconstitutional impairment of contract.

f. A trial of this matter is not likely to render an appeal moot.

14. The Court also finds that there is a danger of hardship or injustice to the parties that will be alleviated by an immediate appeal. All parties have a vested and compelling interest in the correct, timely resolution of this matter. [The City firmly believes the /s/ GNB] Court of Appeals has made new law in this case. The pursuit of lengthy, expensive, disruptive and intrusive discovery (as many as 30 or more depositions), and a trial in this matter, uncertain of the Court of Appeals' intent and manner of resolution of the legal issues presented would be wasteful, expensive and futile. The Court also finds that the related financial hardship and the injustice of proceeding in doubt would be served by allowing pursuit of an appeal at this time.

15. The Court finds that an immediate appeal in this matter will provide the most cost-effective, expeditious and fair means of resolving this matter. The Court also finds that an immediate appeal may resolve most any further proceedings or trial on the complicated issue of damages and valuation, thereby resulting in a substantial savings of time, resources and the avoidance of disruption to the parties and the Court.

16. The Court also finds that an appeal in this matter is inevitable regardless of the outcome of the damages trial and, therefore, it makes sense to provide for an immediate appeal, now, to resolve the many unresolved issues and claims.

17. In sum, the Court finds that there is no just reason for delay and its Order on Motions for Summary

Judgment dated December 14, 2001 should be denominated a final appealable order pursuant to Rule 54(b).

The Court, therefore, hereby ORDERS, ADJUDGES AND DECREES that pursuant to Rule 54(b) there is no just reason for delaying entry of a final judgment under Rule 54(b) and, therefore, entry of a final appealable judgment regarding the Order on Motions for Summary Judgment dated December 14, 2001, is hereby directed and ordered.

DONE this [8th] day of ~~December, 2001~~ [February, 2002. s/ GNB].

/s/ George N. Bowden
THE HONORABLE GEORGE BOWDEN

Presented by:

KEATING, BUCKLIN & McCORMACK, INC., P.S.

/s/ Stephanie Croll
STEPHANIE E. CROLL, WSBA #18003
MICHAEL E. WALTER, WSBA #19044
Attorneys for Defendant City of Marysville

GRANT K. WEED, CHARTERED
AND HENDON, INC., P.S.

/s/ Grant Weed (jmc)
GRANT K. WEED, WSBA #11243
Attorneys for Defendant City of Marysville

Approved as to form;
notice of presentation waived:

HUTCHISON FOSTER & WEIGELT

/s/ _____
WILLIAM B. FOSTER, WSBA #8720
Attorneys for Plaintiff Vine Street

DENNIS JORDAN & ASSOCIATES

/s/ _____

DENNIS K. JORDAN, WSBA #4904
Attorneys for Plaintiffs Smokey Point Properties, Monty, Stampf, Sandstrom and Huitger

Superior Court of the State of Washington
for Snohomish County

SNOHOMISH COUNTY COURTHOUSE
M/S #502
3000 ROCKEFELLER AVENUE
EVERETT, WASHINGTON 98201-4046

Linda C. Krese
Judge

(206) 388-3954
(206) 388-3421

28 January 1998

Michael Walter
800 Fifth Ave, Suite 4141
Seattle, WA 98104

Grant Weed
21 Avenue A
Snohomish, WA 98290-2962

William Foster
20006 Cedar Valley Road
P.O. Box 69
Lynnwood, WA 98046-0069

Dennis Jordan
4202 Hoyt Ave
Everett, WA 98203-2317

Re: Vine Street, et al. v. City of Marysville
Cause No.: 95-2-0755-4

Dear Counsel:

Enclosed please find a copy of the court's Order Granting City of Marysville's Motion for Summary Judgment and Denying the Plaintiffs' Motion for Summary Judgment. This letter is intended to provide a brief explanation of the order.

After reviewing all of the materials submitted with regard to both motions as well as relevant authorities cited by both sides, I reached the conclusion that the City of Marysville did have the authority to impose a requirement that a property owner sign and [sic] annexation petition in order to receive utility services under the circumstances presented here. I further concluded that the formation of the ULID in 1973 did not prohibit the city from imposing this condition by ordinance in 1982. The ULID required construction of a sewer line and appurtenances it did not specify the exact circumstances under which service would be provided to any parcel of real property within the ULID.

Plaintiffs concede that the city could impose reasonable conditions on the provision of such service but that the imposition of the annexation requirement was not such a reasonable condition. This is not supported by the facts or law. The condition was reasonable. Further it was easily met until such time as the property owners decided to sign a petition for annexation to Arlington with full knowledge that such an action would mean they could not fulfill the requirements for obtaining water and sewer service from Marysville.

This conclusion renders the other grounds for relief urged by plaintiffs moot, with the exception of plaintiffs' equal protection claim. This claim is based on the fact that two parcels of real property were granted temporary water and sewer service despite the fact that the owners of record had also signed petitions for annexation to Arlington and thus could not meet Marysville annexation requirements.

However, the circumstances with regard to those two properties differ from those presented by plaintiffs and

therefore do not support a claim that the plaintiffs have not received equal protection under the law. Most importantly, those properties were granted only temporary service based on conditions which the Marysville city council deemed exceptional.

The plaintiffs in this case have not presented any evidence of similar exceptional circumstances. Furthermore, they were seeking *permanent* service, not temporary. Therefore, the plaintiffs have failed to raise a genuine issue of material fact as to their claim of violation of their right of equal protection.

Very truly yours,

/s/ Linda C. Krese
Linda C. Krese
Judge

HONORABLE LINDA C. KRESE
Department No. 12

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

VINE STREET COMMERCIAL PARTNERSHIP, a Washington General Partnership, SMOKEY POINT PROPERTIES, a Washington General Partnership consisting of RALPH MONTY and MARY ANN MONTY, husband and wife; HENRY R. STAMPF and CINDY STAMPF, husband and wife; J. ROBERT SANDSTROM and KARLENE SANDSTROM, husband and wife; and RON HUITGER, a single man, Plaintiffs, v. THE CITY OF MARYSVILLE, a Washington municipal corporation, Defendant.	NO. 95-2-07655-4 **ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT CITY OF MARYSVILLE AND DENYING SUMMARY JUDGMENT TO PLAINTIFFS**

THIS MATTER CAME BEFORE the Honorable Linda C. Krese, Judge of the above-entitled Court, on Defendant City of Marysville's Motion for Summary Judgment seeking dismissal of the Plaintiffs' Amended Complaint and Plaintiffs' Motion for Summary Judgment. Plaintiff

Vine Street Commercial Partnership was represented by and through its attorney of record, William B. Foster of Hutchinson, Foster and Weigelt. Plaintiffs Smokey Point Properties, Monty, Huitger, Stampf and Sandstrom were represented by and through their attorney of record, Dennis A. Jordan, of Dennis A. Jordan & Associates, Inc., P.S. The Defendant City of Marysville was represented by and through its associated counsel of record, Michael C. Walter of Keating, Bucklin & McCormack, P.S. and Grant K. Weed of Keithly, Weed and Graafstra, P.S.

THE COURT considered the following documents and evidence in granting Defendant City of Marysville's Motion and in Denying Plaintiffs' Motion:

1. Declaration of Grant K. Weed, and 9 exhibits appended thereto;
2. Declaration of David K. Zabell, and 9 exhibits appended thereto;
3. Declaration of David Weiser, and 2 exhibits appended thereto;
4. Declaration of Gloria Hirashima, and exhibit appended thereto;
5. Declaration of Larry Wade;
6. Declaration of Ken Hall and exhibit appended thereto;
7. Exhibit 1 to Plaintiffs' Motion For Summary Judgment;
8. Exhibit 3 to Plaintiffs' Motion for Summary Judgment;
9. Exhibit 4 to Plaintiffs' Motion for Summary Judgment;

10. Exhibit 6 to Plaintiffs' Motion for Summary Judgment;

11. Exhibit 7 to Plaintiffs' Motion for Summary Judgment;

12. Exhibit 8 to Plaintiffs' Motion for Summary Judgment;

13. Exhibit 9 to Plaintiffs' Motion for Summary Judgment;

14. Exhibit 10 to Plaintiffs' Motion for Summary Judgment;

15. Exhibit 13 to Plaintiffs' Motion for Summary Judgment;

16. Exhibit 14 to Plaintiffs' Motion for Summary Judgment;

17. Exhibit 16 to Plaintiffs' Motion for Summary Judgment;

18. _____
_____

THE COURT, considered the following pleadings in granting the Defendant City of Marysville's Motion and in Denying the Plaintiffs' Motion for Summary Judgment:

1. Index for [Marysville] Motion for Summary Judgment;

2. Marysville's Motion for Summary Judgment;

3. Plaintiffs' [sic] Responsive Memorandum of Authorities;

4. City of Marysville's: (1) Motion to Strike Plaintiffs' Responsive Memorandum; Or,

Alternatively, (2) Reply RE: Summary Judgment;

5. [Plaintiffs'] Motion for Summary Judgment;

6. Marysville's Memorandum In Opposition to [Plaintiffs'] Motion for Summary Judgment.

THE COURT heard argument of counsel and was otherwise fully apprised of the facts, issues and authorities presented; Now therefore, it is hereby:

ORDERED, ADJUDGED AND DECREED that Defendant City of Marysville's Motion for Summary Judgement is hereby **GRANTED**, and Plaintiffs' Amended Complaint and all claims and causes of action asserted therein is hereby dismissed with prejudice; and it is hereby further

ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Summary Judgment is hereby **DENIED**; and it is hereby further

ORDERED, ADJUDGED AND DECREED that Defendant City of Marysville is the prevailing party on this Motion and is entitled to statutory costs and attorney fees, as provided for by law.

DONE IN OPEN COURT this 23 day of ~~October~~ January, 1998.

/s/ Linda C. Krese
HONORABLE LINDA C. KRESE
Snohomish County Superior Court Judge

Presented by:

KEATING, BUCKLIN & McCORMACK, P.S.

/s/ Michael C. Walter
Michael C. Walter, WSBA #15044
Associated Counsel for Defendant
City of Marysville

Notice of Presentation hereby
waived; approved as to form.

KEITHLY, WEED & GRAAFSTRA, INC., P.S.

/s/ Grant K. Weed
Grant K. Weed, WSBA#11243
Attorney for City of Marysville

HUTCHISON FOSTER & WEIGELT

_____
William B. Foster, WSBA #8270
Attorneys for Plaintiff Vine Street Partnership

DENNIS A. JORDAN & ASSOCIATES, INC., P.S.

_____
Dennis A. Jordan, WSBA #4904
Attorney for Plaintiffs Smokey Point Properties,
Monty, Huitger, Stampf and Sandstrom

THE SUPREME COURT OF WASHINGTON

VINE STREET COMMERCIAL PARTNERSHIP, a Washington general partnership; SMOKEY POINT PROPERTIES, a Washington general partnership consisting of RALPH MONTY and MARYANN MONTY, husband and wife, HENRY R. STAMPF and CINDY STAMPF, husband and wife, J. ROBERT SANDSTROM and KARLENE SANDSTROM, husband and wife, and RON HUITGER, a single man, Respondents, v. THE CITY OF MARYSVILLE, a Washington municipal corporation, Petitioner.	NO. 69457-5 **ORDER** C/A NO. 42206-5-I (Filed Jul. 12, 2000)

Department II of the Court considered this matter at its July 11, 2000, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 12th day of July, 2000.

/s/ Richard P. Guy
CHIEF JUSTICE

THE SUPREME COURT OF WASHINGTON

VINE STREET COMMERCIAL PARTNERSHIP, a Washington general partnership; SMOKEY POINT PROPERTIES, a Washington general partnership consisting of RALPH MONTY and MARYANN MONTY, husband and wife; HENRY R. STAMPF and CINDY STAMPF, husband and wife; J. ROBERT SANDSTROM and KARLENE SANDSTROM, husband and wife; and RON HUITGER, a single man, Respondents, v. THE CITY OF MARYSVILLE, a Washington municipal corporation, Petitioner.	NO. 74744-0 **ORDER** C/A NO. 50009-1-I (Filed Jun. 2, 2004)

Department I of the Court, composed of Chief Justice Alexander and Justices Johnson, Sanders, Bridge and Owens, considered this matter at its June 2, 2004, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 2nd day of June, 2004.

For the Court

/s/ Gerry L. Alexander
CHIEF JUSTICE

The United States Constitution

Article 1, Section 10

Clause 1: No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

The Federal Civil Rights Act

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

VINE STREET COMMERCIAL PARTNERSHIP, a Washington General Partnership; SMOKEY POINT PROPERTIES, a Washington general partnership consisting of RALPH MONTY and MARYANN MONTY, husband and wife; HENRY R. STAMPF and CINDY STAMPF, husband and wife; J. ROBERT SANDSTROM and KARLENE SANDSTROM, husband and wife; RON HUITGER, as his separate estate; Plaintiffs, vs. THE CITY OF MARYSVILLE, a Washington Municipal Corporation, Defendant.	No. 95-2-07655-4 **AMENDED COMPLAINT FOR DAMAGES** (Filed Dec. 12, 1996)

COME NOW the Plaintiffs above named, and for cause of action against the Defendant, and alleges as follows:

1. ***Plaintiffs***

1.1 The Plaintiff, VINE STREET COMMERCIAL PARTNERSHIP, is a Washington general partnership (hereinafter referred to as "Vine Street"), organized and existing under the laws of the State of Washington. That the said Plaintiff is the owner of the real property situate in the County of Snohomish, State of Washington, described as follows, to wit:

> That portion of the Northwest quarter of the Northwest quarter of Section 28, Township 31 North, Range 5 East, W.M., described as follows:
>
> The East 30 feet of the following described tract:
>
> The North ⅛ of the Northwest quarter of Section 28, Township 31 North, Range 5 East, W.M.; except that portion lying in the Northeast quarter of the Northwest quarter of said Section 28;
>
> EXCEPT the North 30 feet thereof known as 172nd Street Northeast; AND EXCEPT portion thereof conveyed to Snohomish County by Warranty Deed recorded under Snohomish County Recording No. 9009260295;
>
> TOGETHER WITH the following described parcel: The South one-half of the North ⅜th of the Northwest quarter of Section 28, Township 31 North, Range 5 East, W.M.; EXCEPT the West 12 acres thereof; AND EXCEPT that portion lying in the Northeast quarter of the Northwest quarter of said Section 28;
>
> Situate in the County of Snohomish, State of Washington

Which property is commonly known as 3704 – 172nd Avenue N.E., Arlington, Washington.

1.2 The Plaintiff, SMOKEY POINT PROPERTIES, a Washington general partnership (hereinafter "Smokey Point"), is a Washington general partnership composed of RALPH MONTY and MARYANN MONTY; RON HUITGER, as his separate estate; HENRY R. STAMPF and LYNDI STAMPF; J. ROBERT SANDSTROM and KARLENE SANDSTROM, (hereinafter collectively referred to as "Monty") are all residents of Snohomish County, State of Washington.

1.3 That the Plaintiff, Smokey Point, is the owner of certain property located in Snohomish County, State of Washington, described as follows, to wit:

> The north ⅜ of the following described property: The northeast quarter of the southeast quarter of the northeast quarter and the east 16 feet of the northwest quarter of the southeast quarter of the northeast quarter, all in section 29, township 31 north, rage [sic] 5 east, W.M.,
>
> Except the east 30 feet thereof for State highway.
>
> Except all that portion thereof, described as follows: Commencing at the northeast corner of said subdivision 30.02 feet 84° 09'08" east along the north line of said subdivision 30.02 feet to the west line of county road and the true point of beginning; Thence southerly along the west line of said county road 212.75 feet; Thence west parallel to the north line of northeast quarter of the southeast quarter of the northeast quarter of said section 29, a distance

of 204.75 feet; Thence north parallel to the west line of said county road 212.75 feet to intersection with the north line of said northeast quarter of the southeast quarter of the northeast quarter; Thence east along said north line 204.75 feet to the true point of beginning.

Situate in Snohomish County, State of Washington.

1.4 That the said Plaintiffs, Monty and Huitger, are the owners of the real property situate in the County of Snohomish, State of Washington, described as follows, to wit:

Lots 3, 5A, 5B, 5C, 5D, 6, 7, 8, 9, 11, 15, 16, 17 and 18 of the Plat of The Park, as per plat recorded in Volume ___ of plats, pages ___, inclusive, records of Snohomish County, State of Washington.

2. ***Defendant.***

The Defendant herein is The City of Marysville. The said Defendant is a municipal corporation organized and existing under the laws of the State of Washington.

3. ***Actions of the Defendant Resulting in Damage to the Plaintiffs.***

3.1 The decision of the City of Marysville to deny the Plaintiffs' applications for a Utility Commitment Letter, and to deny the Plaintiffs' applications for water and sewer service.

3.2 Resolution No. 1788, which denied the application of Vine Street for a variance from the application of Marysville Municipal Code (MMC), Section 14 regarding

the application for utility service, and in particular, MMC 14.32 et seq. (The "RUSA" ordinance). A copy of said resolution is attached hereto as Exhibit "A", and incorporated herein by reference as if fully set forth.)

3.3 Resolution No. 1787, which denied the applications of Smokey Point and Monty for a variance from the application of Marysville Municipal Code (MMC), Section 14 regarding the application for utility service, and in particular, MMC 14.32 et seq. (the "RUSA" ordinance). A copy of said resolution is attached hereto as Exhibit "B", and incorporated herein by reference as if fully set forth.)

4. ***Background Statement of Facts.***

4.1. The real estate described herein is located within the boundaries of the City of Marysville ULID #1. The legislative history of that ULID is as follows;

4.1.1 That on July 9, 1973, the City of Marysville enacted Ordinance 794. That Ordinance created a Local Improvement District commonly known as Smokey Point L.I.D. Ordinance 794 was based upon a petition filed on May 29, 1973, wherein affected property owners requested "that the City of Marysville . . . form a local improvement district for the purpose of constructing sewer mains, lift stations and appurtenances to run from the present terminus of the city sewer System to the territory within the proposes [sic] district through territory not within the proposed district . . . "

4.1.2 As stated by the terms and conditions of Ordinance 794, the City of Marysville specifically determined that the real property located within the

proposed district would be "specifically benefited by the proposed improvement".

4.1.3 As a result of the special benefit conferred upon the real estate located within the service area of the LID, each of those properties were assessed a portion of the total cost of the improvements 100% of which assessment has now been paid in full by those property owners included within the LID boundaries and/or their successors in interest.

4.1.4 At the time that the Ordinance 794 was enacted, the Smokey Point LID was then also known as LID #56. By Ordinance 820 dated August 12, 1974, ULID #56 was renamed Utility Local Improvement District #1 (ULID #1).

4.2. The properties that are the subject matter of ULID #1 are also the subject matter of a City of Arlington annexation petition which has been acted upon by the City of Arlington. It became apparent to the Plaintiffs that new permits for connection to either the sewer or water service provided the area within the ULID boundaries would likely not be granted by the City of Marysville unless the Plaintiffs (and others) withdrew their support of the annexation of their properties to the City of Arlington.

4.3. In order to formally address the issue of whether or not the City of Marysville would provide new connections to water and sewer utilities for properties located within the area that was the subject matter of the City of Arlington annexation petition, the City of Marysville took testimony at a public hearing held on August 28, 1995. Attached as "C" is a copy of the decision of the

Council following their having considered the matter in executive session.

4.4 That the Plaintiffs have paid the entire amount of the assessment levied upon the said property by the City of Marysville under the aforementioned ULID. In fact, all of the lines for the utilities have been installed, and the only remaining action necessary is to connect the Plaintiffs' property to those lines.

4.5 Prior to that decision as described by Exhibit "C", the Plaintiffs, Smokey Point and Monty, applied to the City of Marysville for a utility commitment letter regarding the City's willingness to service a portion of the Monty real estate located within ULID #1 with utilities. On or about September 1, 1995, the Plaintiffs received a letter from the City of Marysville denying the request for a commitment letter. (A copy of that letter is attached as Exhibit "D".) In pertinent part, the letter states as follows:

> "As you may know, the City Council passed a motion reaffirming its intent to require utility applicants to meet all requirements of the City Code, including, but not limited to the execution of either an annexation covenant or annexation petition in favor of Marysville (see M.M.C. 14.32.040). Any property owner who has previously signed a petition to annex to another jurisdiction would not be able to meet this requirement, at least at this time, and as such, a utility commitment letter cannot be issued."
>
> In the event circumstances change so that you can provide a binding, irrevocable commitment

to annex to the City of Marysville, we will reconsider your request.

4.6 That on the 5th day of October, 1995, the Plaintiffs filed an action in the Superior Court in and for the County of Snohomish, under Cause No. 95020076554, which action sought a Writ of Mandamus requiring the City of Marysville to issue to the Plaintiffs binding commitments to provide sewer and water to the Plaintiffs' property.

4.7 That on the 27th day of December, 1996, The Honorable Joseph A. Thibodeau, Judge of the Snohomish County Superior Court, entered an order denying the Plaintiffs' application for Writ of Mandamus upon the basis that the Plaintiffs had failed to exhaust their administrative remedies. A copy of said Order is attached hereto as Exhibit "E", and which is incorporated herein by reference as if fully set forth.

4.8 That on the 9th day of January, 1996, the Plaintiff, Vine Street, made application to the City of Marysville for a Utility Commitment Letter, a copy of which Application is attached hereto as Exhibit "F", and which is incorporated herein by reference as if fully set forth.

4.9 That by letter dated the 16th day of June, 1996, the City of Marysville, by and through Dave Zabell, issued a letter to the Plaintiff, Vine Street, denying the Plaintiff's request for a Utility Commitment Letter.

4.10 That the Plaintiffs, Smokey Point and Monty, filed with the City of Marysville in a timely manner an Application for Utility Variance.

4.11 That on or about the 26th day of January, 1996, the Plaintiff, Vine Street, filed with the City of Marysville, an Application for Utility Variance, a copy of which is attached hereto as Exhibit "G", and which is incorporated herein by reference as if fully set forth.

4.12. That the applications of all Plaintiffs, Vine Street, Smokey Point and Monty were considered by the full city council at a regularly scheduled meeting held on the 4th day of March, 1996, and the applications of all Plaintiffs were denied. That the action of the city council resulted in the adoption of Resolution Nos. 1787 and 1788 on the 25th day of March, 1996.

4.13 While the mandamus action was pending (as well as a companion LUPA action filed under the Snohomish County Cause Number 96-2-02947-3), the City of Arlington and the Defendant, City of Marysville, settled their issues in such a manner that the Defendant, City of Marysville, thereafter agreed to provide the utility service requested by the Plaintiffs. That action rendered moot the relief requested under the LUPA cause of action as well as the mandamus relief sought under this cause of action. Nevertheless, the Plaintiffs seek the recovery of damages arising as a result of the Defendant's wrongful denial of the utility letters requested and the wrongful denial of the variances requested.

5. ***Claims.***

5.1 The Defendant's decision to deny the Plaintiffs application for a Utility Commitment Letter is based upon an erroneous interpretation of law, is not supported by substantial evidence, and is a clearly erroneous application of the law to the facts.

5.2 The Defendant's application of MMC 14.32 et seq. to the Plaintiffs is a violation of the Plaintiffs' constitutional rights prohibiting impairment of contract as proscribed by Washington State Constitution, Article 1, § 23, and the 10th Amendment to the Constitution of the United States of America.

5.3 The Defendant's denial of the Plaintiffs' application for a Utility Commitment Letter is a violation of the Plaintiffs' constitutional right of equal protection as proscribed by Washington State Constitution, Article 1, § 12, and the 14th Amendment to the Constitution of the United States of America.

5.4 The Defendant's decision to deny the Plaintiffs' application for a variance from the requirements of MMC 14.32 et seq. is based upon an erroneous interpretation of law, is not supported by substantial evidence, and is a clearly erroneous application of the law to the facts.

5.5 The Defendant's decision to deny the Plaintiffs' application for variance from the requirements of MMC 14.32 et seq. is a violation of the Plaintiffs' constitutional right of equal protection as proscribed by Washington State Constitution, Article 1, § 12, and the 14th Amendment to the Constitution of the United States of America.

5.6 The Defendant's decision to deny the Plaintiffs' application for a variance from the requirements of MMC 14.32 et seq. is a violation of the Plaintiffs' constitutional rights prohibiting impairment of contract as proscribed by Washington State Constitution, Article 1, § 23, and the 10th Amendment to the Constitution of the United States of America.

5.7 That the Defendant's refusal to provide sanitary water service to the Plaintiffs is contrary to the Coordinated water system plan adopted pursuant to the provisions of RCW 70.116, which plan was approved by the Defendant, City of Marysville, such refusal being based upon is based upon an erroneous interpretation of law, is not supported by substantial evidence, and is a clearly erroneous application of the law to the facts.

5.8 That the Defendant's refusal to provide sanitary water service to the Plaintiffs is contrary to the agreement adopted by the City of Marysville to implement the Coordinated water system plan adopted pursuant to the provisions of RCW 70.116, which plan was approved by the Defendant, City of Marysville, such refusal being based upon is based upon an erroneous interpretation of law, is not supported by substantial evidence, and is a clearly erroneous application of the law to the facts.

5.9 That the City's actions as described above are in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983.

5.10 That the City's actions constitute a violation of RCW 64.40.020 in that the City's actions were arbitrary, capricious and unlawful.

6. ***Request for Relief.*** Based upon the foregoing, Plaintiffs request that the Court grant judgment in favor of the Plaintiffs, and against the Defendant, City of Marysville for such damages as ill [sic] be proven at the time of trial, which damages are a direct and proximate result of the Defendant's failure to timely issue the Utility Letters requested together with the Plaintiffs'

reasonable attorney's fees and cost, and together with such other and further relief as the Court may deem just and proper.

DATED THIS 4th day of December, 1996.

/s/ William B. Foster
William B. Foster, WSBA #8270
of Hutchison, Foster & Weigelt
Attorneys for Plaintiff, Vine Street

/s/ Dennis Jordan
Dennis Jordan, WSBA #4704
of Dennis Jordan & Associates
Attorneys for Plaintiffs, Smokey Point Properties, Monty & Huitger

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EXHIBIT A

CITY OF MARYSVILLE
Marysville, Washington

RESOLUTION NO. 1788

A RESOLUTION OF THE CITY OF MARYSVILLE DENYING A UTILITY VARIANCE FOR THE VINE STREET COMMERCIAL PARTNERSHIP PROPERTY LOCATED AT 3704 – 172ND AVENUE N.E., ARLINGTON, WASHINGTON.

WHEREAS, on January 26, 1996 Vine Street Commercial Partnership applied for a utility variance for one sewer and two water connections for property located at 3704 – 172nd Avenue N.E., Arlington, Washington, under file number UV 96-003;4 and

WHEREAS, consideration of the variance application was scheduled for the Marysville City Council meeting of March 4, 1996 in order that the applicant could inquire with the City of Arlington concerning its willingness and ability to provide sewer and water utility services to the applicant's property and so the matter could be heard at the same meeting as the Ralph Monty variance requests; and

WHEREAS, at the March 4, 1996 Marysville City Council meeting the Council received written and verbal information from the applicant and his attorney, a written and verbal report from City staff, and information from other interested persons, all of which is incorporated by this reference; and

WHEREAS, as a result of all of the information provided and considered by the Marysville City Council, it makes the following findings with respect to the variance application filed under file number UV 96-003;

1. The applicant's property is outside of the Marysville city limits and within an area known as the "Smokey Point Annexation" which was approved by the Boundary Review Board for Snohomish County for annexation to the City of Arlington on December 5, 1995. However, the annexation is subject to a pending appeal in Snohomish County Superior Court.

2. The property is within the City's Rural Utility Service Area ("RUSA") and Critical Water Study Plan ("CWSP") boundaries and is within the joint Arlington-Marysville urban growth area established by Snohomish County.

3. The applicant's variance is subject to MMC 14.10.030 relating to applications for utility service, which reads in pertinent part as follows:

> The owner of any property desiring to connect to the City water or sewer system shall personally apply for the connection on such forms as may be prepared and made available by the City Utility Department. No such application shall be deemed accepted or granted by the City, and no vested rights to utility service shall accrue, unless and until all prerequisites for approval, as specified by ordinance or resolution, are complied with in full and to the satisfaction of the City. For properties located outside of the city limits, the provisions of Chapter 14.32 MMC (RUSA Code) shall apply.

4. The applicant's variance is also subject to MMC 14.32.040, which provides the criteria for utility connections within the city's RUSA boundary. MMC 14.32.040(2) requires as a condition of receiving city utilities that the property be suitable for ultimate annexation to the city and that the property owner sign a petition to annex the property to the city or sign an annexation covenant to annex to the city in the future. Such provisions are mandatory. MMC 14.32.040(2) reads as follows:

> A property applying for a utility connection must be suitable for ultimate annexation to the city based upon its proximity to the city, the long-range plans of the City to annex that area, the proposed use of the property, the potential urbanization which will result from the use, and the environmental and economic impact of such urbanization and the annexation of the property into the city. The owner of any property granted utility connections shall sign a petition to annex the property to the city, and may be required to obtain similar petitions from other property owners in the immediate vicinity so as to compose a logical extension of the city's boundaries. In the

> event that the property granted utility connections is not then contiguous to the city limits, the City may waive the requirement for an annexation petition and may allow the owner, instead, to sign a covenant agreeing to petition for and/or consent to an annexation of the property immediately upon the same becoming contiguous to the city limits or upon it being included within a larger annexation proposal. The covenant shall be binding upon the owner, its heirs, successors and assigns, and shall be construed as a covenant running with the land. It shall be recorded in the records of the Snohomish County Auditor prior to connection of the property to the utility system.

5. The applicant's property is not contiguous with the Marysville city limits.

6. Prior to the application for utility service, the applicant signed a petition for annexation of the subject property to the City of Arlington. The petition was approved by the City of Arlington and the Snohomish County Boundary Review Board.

7. Because of the applicant's decision to sign a petition to annex to another city, the applicant is unable to execute a valid annexation covenant to Marysville as required by MMC 14.32.040(2). The applicant requests a variance from this requirement.

8. The provisions of MMC 14.32.040(8) also apply to the applicant's request for utilities. MMC 14.32.040(8) reads as follows:

> City utilities will not be offered for properties which have other practical and feasible sources for such services.

9. The City requested that the applicant request a letter from the City of Arlington as to whether it would provide water and sewer service to the applicant's property. By letter dated February 26, 1996, the applicant's legal counsel indicated that the applicant did not make such inquiry with Arlington.

10. MMC 14.32.040(9) applies to the applicant's request for utilities. MMC 14.32.040(9) reads as follows:

> Utilities will not be granted where such service, and the City's regulation thereof, would create a conflict with another municipal jurisdiction or utility district. Utilities will not be granted where the annexation of the property would be legally impossible because of conflicting jurisdictions.

11. In the event the Smokey Point annexation becomes final, annexation of the applicant's property would be legally impossible.

12. The provisions of MMC 14.32.050 relating to utility implementation rules apply to the applicant's utility request. Specifically, MMC 14.32.050(3) applies to this request and reads as follows:

> Utility service to properties within a ULID, or to other properties with preexisting contractual commitments from the City, is contingent upon compliance with MMC 14.32.040(1) through (5). The remaining subsections of MMC 14.32.040 shall not apply to such properties.

13. The applicant argues that his participation in ULID No. 1 exempts him from the requirements of MMC Chapter 14.32 and specifically MMC 14.32.040(2), which requires as a condition of

receiving utilities the execution of an annexation covenant in favor of Marysville.

14. While ULID No. 1 was adopted as a financing mechanism for construction of some of the sewer lines in the vicinity of the applicant's property, it did not preclude the adoption of other rules for the connection to City utilities.

15. The provisions of MMC 14.32.050(3) specifically require properties within a ULID to comply with MMC 14.32.040(1) through (5), which include the annexation covenant requirement.

16. The provisions of MMC 14.32.060(4) establish the criteria for granting variances from the provisions of MMC Chapter 14.32, the City's RUSA Code. MMC 14.32.060(4) reads in pertinent part as follows:

> The City Council is authorized to issue such variances only if it is found that a literal enforcement of this chapter would cause practical difficulties or unnecessary hardships. No such variance shall be authorized unless the Council finds that all of the following facts and conditions exist:
>
> (a) That there are exceptional or extraordinary circumstances or conditions applying to the subject property or as to the intended use thereof that do not apply generally to other properties in the same vicinity;
>
> (b) That such variance is necessary for the preservation and enjoyment of a substantial property right of the applicant possessed by the owners of other properties in the same vicinity;
>
> (c) That the authorization of such variance will not be materially detrimental to the public interest, welfare, or the environment;

(d) That the granting of such variance will not be inconsistent with the long-range plans of the city utility system, or jeopardize utility availability for properties within the city limits.

17. Prior to the applicant's signing an annexation petition in favor of Arlington, it had developed other properties outside of the Marysville city limits which are served by Marysville sewer and water utilities. On prior occasions, the applicant has signed annexation covenants in favor of Marysville. The applicant was aware of such requirement prior to its execution of the annexation petition in favor of Arlington. The applicant's inability to sign a valid annexation covenant to Marysville or to be able to comply with MMC 14.32.040(2) is due to his own action in executing an annexation petition to Arlington.

18. The present outstanding City indebtedness for the City's utility system is approximately $26,000,000. That debt is secured solely by the citizens residing within the Marysville city limits and not those citizens or utility customers residing outside of the Marysville city limits. One purpose of the City's RUSA Code requirement for annexation or execution of an annexation covenant to Marysville as a condition of receiving utilities is to preserve the public interest and welfare of the citizens of Marysville by ultimately annexing those properties which are served by Marysville sewer and water utilities.

19. In light of all of the above findings, the variance application does not meet the variance criteria of MMC 14.32.060(4)(c), which require a finding that the authorization of the variance will not be materially detrimental to the public interest, welfare or the environment. Authorization of utility connections to the applicant's property without execution of a valid annexation covenant to Marysville would conflict with

the long-range plans of the City's utility system which is to annex areas served by Marysville utilities. The public interest and welfare of the citizens of Marysville is best served by annexation of areas served by Marysville, utilities as Marysville citizens are obligated to secure the outstanding indebtedness of the utility. The public interest and welfare of the citizens of Marysville are not served where the City serves utilities to properties over which it will not have ultimate municipal authority to control such matters as permitting, zoning, planning and growth, all of which can have impacts on the City's water and sewer utility.

20. The applicant's variance also does not meet the variance criteria of MMC 14.32.040(4)(d), as the granting of the variance would be inconsistent with the long-range plans of the City's utility system, which is to serve utilities only to properties which are ultimately suitable for annexation to Marysville and which do not conflict with another municipal jurisdiction. See MMC 14.32.040(9). The inability to execute an annexation petition or annexation covenant in favor of Marysville is inconsistent with the long-range plans of the City utility system. Such inability could also jeopardize utility availability for properties within the city limits, since absent the ability to annex, the City would have no ultimate control over permitting, zoning, planning and growth in the area of the applicant's property.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MARYSVILLE, WASHINGTON AS FOLLOWS:

Based upon the above findings, the applicant's variance requests under file number UV 96-003 is [sic] hereby DENIED.

Any party aggrieved by this resolution shall have the right to file a land use petition under the Land Use Petition Act in Snohomish County Superior Court; PROVIDED, that

the petition must be filed and served on all necessary parties within twenty-one (21) days of the date of this Resolution.

PASSED by the City Council and APPROVED by the Mayor this 25th day of March, 1996.

CITY OF MARYSVILLE,

By /s/

ATTEST:

By /s/
CITY CLERK

Approved as to form:

By /s/
CITY ATTORNEY

EXHIBIT B

CITY OF MARYSVILLE
Marysville, Washington

RESOLUTION NO. 1787

A RESOLUTION OF THE CITY OF MARYSVILLE DENYING A UTILITY VARIANCES FOR THE RALPH G. MONTY AND MARY ANN MONTY PROPERTIES LOCATED AT 167TH STREET AND SMOKEY POINT BOULEVARD, ARLINGTON, WASHINGTON.

WHEREAS, on December 14, 1995 Ralph Monty applied for a utility variance for 14 sewer and 14 water connections for property located at 167th Street and Smokey Point Boulevard, Arlington, Washington, under file number UV 95-020; and

WHEREAS, on December 14, 1995 Ralph Monty applied for three sewer and three water connections for separate property located at 167th Street and Smokey Point Boulevard, Arlington, Washington, under file number UV 95-021; and

WHEREAS, on January 8, 1996 the Marysville City Council held a public meeting to review the variance applications and to consider information provided by City staff, the applicant, his legal representative and other interested parties, all of which is incorporated by this reference; and

WHEREAS, consideration of the variance applications was continued to the Marysville City Council meeting of February 12, 1996 in order that the applicant could inquire with the City of Arlington concerning its willingness and ability to provide sewer and water utility services to the applicant's property; and

WHEREAS, by letter dated February 12, 1996 legal counsel for the applicant requested that the matter be continued; and

WHEREAS, the matter was rescheduled for March 4, 1996; and

WHEREAS, at the March 4, 1996 Marysville City Council meeting the Council received additional written and verbal information from the applicant and his attorney, a written and verbal report from City staff, and information from other interested persons, all of which is incorporated by this reference; and

WHEREAS, as a result of all of the information provided and considered by the Marysville City Council, it makes the following findings with respect to each of the

variance applications filed under file numbers UV 95-020 and UV 95-021:

1. The applicant's property is outside of the Marysville city limits and within an area known as the "Smokey Point Annexation" which was approved by the Boundary Review Board for Snohomish County for annexation to the City of Arlington on December 5, 1995. However, the annexation is subject to a pending appeal in Snohomish County Superior Court.

2. The property is within the City's Rural Utility Service Area ("RUSA") and Critical Water Study Plan ("CWSP") boundaries and is within the joint Arlington-Marysville urban growth area established by Snohomish County.

3. The applicant's variances are subject to MMC 14.01.030 relating to applications for utility service, which reads in pertinent part as follows:

> The owner of any property desiring to connect to the City water or sewer system shall personally apply for the connection on such forms as may be prepared and made available by the City Utility Department. No such application shall be deemed accepted or granted by the City, and no vested rights to utility service shall accrue, unless and until all prerequisites for approval, as specified by ordinance or resolution, are complied with in full and to the satisfaction of the City. For properties located outside of the city limits, the provisions of Chapter 14.32 MMC (RUSA Code) shall apply.

4. The applicant's variance is also subject to MMC 14.32.040, which provides the criteria for utility connections within the city's RUSA boundary. MMC 14.32.040(2) requires as a condition of receiving city utilities that the property be suitable for ultimate annexation to the city and that the property owner sign

a petition to annex the property to the city or sign an annexation covenant to annex to the city in the future. Such provisions are mandatory. MMC 14.32.040(2) reads as follows:

> A property applying for a utility connection must be suitable for ultimate annexation to the city based upon its proximity to the city, the long-range plans of the City to annex that area, the proposed use of the property, the potential urbanization which will result from the use, and the environmental and economic impact of such urbanization and the annexation of the property into the city. The owner of any property granted utility connections shall sign a petition to annex the property to the city, and may be required to obtain similar petitions from other property owners in the immediate vicinity so as to compose a logical extension of the city's boundaries. In the event that the property granted utility connections is not then contiguous to the city limits, the City may waive the requirement for an annexation petition and may allow the owner, instead, to sign a covenant agreeing to petition for and/or consent to an annexation of the property immediately upon the same becoming contiguous to the city limits or upon it being included within a larger annexation proposal. The covenant shall be binding upon the owner, its heirs, successors and assigns, and shall be construed as a covenant running with the land. It shall be recorded in the records of the Snohomish County Auditor prior to connection of the property to the utility system.

5. The applicant's property is not contiguous with the Marysville city limits.

6. Prior to the application for utility service, the applicant signed a petition for annexation of the subject property to the City of Arlington. The petition was approved by the City of Arlington and the Snohomish County Boundary Review Board.

7. Because of the applicant's decision to sign a petition to annex to another city, the applicant is unable to execute a valid annexation covenant to Marysville as required by MMC 14.32.040(2). The applicant requests a variance from this requirement.

8. The provisions of MMC 14.32.040(8) also apply to the applicant's request for utilities. MMC 14.32.040(8) reads as follows:

> City utilities will not be offered for properties which have other practical and feasible sources for such services.

9. The City requested that the applicant request a letter from the City of Arlington as to whether it would provide water and sewer service to the applicant's property. The applicant's legal counsel stated that he did not make such inquiry as he felt that such request begged the issue.

10. MMC 14.32.040(9) applies to the applicant's request for utilities. MMC 14.32.040(9) reads as follows:

> Utilities will not be granted where such service, and the City's regulation thereof, would create a conflict with another municipal jurisdiction or utility district. Utilities will not be granted where the annexation of the property would be legally impossible because of conflicting jurisdictions.

11. In the event the Smokey Point annexation becomes final, annexation of the applicant's property would be legally impossible.

12. The provisions of MMC 14.32.050 relating to utility implementation rules apply to the applicant's utility request. Specifically, MMC 14.32.050(3) applies to this request and reads as follows:

> Utility service to properties within a ULID, or to other properties with preexisting contractual commitments from the City, is contingent upon compliance with MMC 14.32.040 (1) through (5). The remaining subsections of MMC 14.32.040 shall not apply to such properties.

13. The applicant argues that his participation in ULID No. 1 exempts him from the requirements of MMC Chapter 14.32 and specifically MMC 14.32.040(2), which requires as a condition of receiving utilities the execution of an annexation covenant in favor of Marysville.

14. While ULID No. 1 was adopted as a financing mechanism for construction of some of the sewer lines in the vicinity of the applicant's property, it did not preclude the adoption of other rules for the connection to City utilities.

15. The provisions of MMC 14.32.050(3) specifically require properties within a ULID to comply with MMC 14.32.040(1) through (5), which include the annexation covenant requirement.

16. The provisions of MMC 14.32.060(4) establish the criteria for granting variances from the provisions of MMC Chapter 14.32, the City's RUSA Code. MMC 14.32.060(4) reads in pertinent part as follows:

The City Council is authorized to issue such variances only if it is found that a literal enforcement of this chapter would cause practical difficulties or unnecessary hardships. No such variance shall be authorized unless the Council finds that all of the following facts and conditions exist:

(a) That there are exceptional or extraordinary circumstances or conditions applying to the subject property or as to the intended use thereof that do not apply generally to other properties in the same vicinity;

(b) That such variance is necessary for the preservation and enjoyment of a substantial property right of the applicant possessed by the owners of other properties in the same vicinity;

(c) That the authorization of such variance will not be materially detrimental to the public interest, welfare, or the environment;

(d) That the granting of such variance will not be inconsistent with the long-range plans of the city utility system, or jeopardize utility availability for properties within the city limits.

17. Prior to the applicant's signing an annexation petition in favor of Arlington, he had developed other properties outside of the Marysville city limits which are served by Marysville sewer and water utilities. On prior occasions, the applicant has signed annexation covenants in favor of Marysville. The applicant was aware of such requirement prior to its execution of the annexation petition in favor of Arlington. The applicant's inability to sign a valid annexation covenant to Marysville or to be able to comply with MMC 14.32.040(2) is due to his own action in executing an annexation petition to Arlington.

18. The present outstanding City indebtedness for the City's utility system is approximately $26,000,000. That debt is secured solely by the citizens residing within the Marysville city limits and not those citizens or utility customers residing outside of the Marysville city limits. One purpose of the City's RUSA Code requirement for annexation or execution of an annexation covenant to Marysville as a condition of receiving utilities is to preserve the public interest and welfare of the citizens of Marysville by ultimately annexing those properties which are served by Marysville sewer and water utilities.

19. In light of all of the above findings, the variance application does not meet the variance criteria of MMC 14.32.060(4)(c), which require a finding that the authorization of the variance will not be materially detrimental to the public interest, welfare or the environment. Authorization of utility connections to the applicant's properties without execution of a valid annexation covenant to Marysville would conflict with the long-range plans of the City's utility system which is to annex areas served by Marysville utilities. The public interest and welfare of the citizens of Marysville is best served by annexation of areas served by Marysville utilities as Marysville citizens are obligated to secure the outstanding indebtedness of the utility. The public interest and welfare of the citizens of Marysville are not served where the City serves utilities to properties over which it will not have ultimate municipal authority to control such matters as permitting, zoning, planning and growth, all of which can have impacts on the City's water and sewer utility.

20. The applicant's variance also does not meet the variance criteria of MMC 14.32.040(4)(d), as the granting of the variance would be inconsistent with the long-range plans of the City's utility system,

which is to serve utilities only to properties which are ultimately suitable for annexation to Marysville and which do not conflict with another municipal jurisdiction. See MMC 14.32.040(9). The inability to execute an annexation petition or annexation covenant in favor of Marysville is inconsistent with the long-range plans of the City utility system. Such inability could also jeopardize utility availability for properties within the city limits, since absent the ability to annex, the City would have no ultimate control over permitting, zoning, planning and growth in the area of the applicant's property.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MARYSVILLE, WASHINGTON AS FOLLOWS:

Based upon the above findings, the applicant's variance requests under file numbers UV 95-020 and UV 95-021 are hereby DENIED.

Any party aggrieved by this resolution shall have the right to file a land use petition under the Land Use Petition Act in Snohomish County Superior Court; PROVIDED, that the petition must be filed and served on all necessary parties within twenty-one (21) days of the date of this Resolution.

PASSED by the City Council and APPROVED by the Mayor this 25th day of March, 1996.

CITY OF MARYSVILLE,

By /s/

ATTEST:

By /s/
CITY CLERK

Approved as to form:

By /s/
CITY ATTORNEY

EXHIBIT C

CITY OF MARYSVILLE
Marysville, Washington

RESOLUTION NO. 1745

A RESOLUTION OF THE CITY OF MARYSVILLE REAFFIRMING ITS POLICY FOR UTILITY SERVICE FOR AREAS OUTSIDE THE MARYSVILLE CITY LIMITS.

WHEREAS, the City of Marysville, pursuant to Title 14 of the Marysville Municipal Code, has adopted rules, policies and procedures relating to applications for and connections to the City water and sewer utilities; and

WHEREAS, pursuant to MMC 14.01.030 no application for utility service is to be accepted or granted, and no right to utility service shall accrue, unless and until all prerequisites for approval as specified by ordinance or resolution are complied with in full to the satisfaction of the City; and

WHEREAS, the City has adopted additional rules, policies and procedures for utility service in rural areas outside the City limits pursuant to Chapter 14.32 of the Marysville Municipal Code; and

WHEREAS, all utility connections in rural areas are to be on the basis of special contracts with the City; and

WHEREAS, pursuant to MMC 14.32.040 and MMC 14.32.050, the City has adopted criteria and implementation

rules for utility connections within its Rural Utility Service Area (RUSA); and

WHEREAS, one of the requirements for granting or denying utility connections within RUSA is the ability of the property owner requesting utilities to sign a petition to annex the property to the City or sign a covenant agreeing to annex in the future; and

WHEREAS, on or about May 1, 1995 the City of Arlington adopted an annexation petition proposing to annex certain properties within Marysville's RUSA; and

WHEREAS, property owners outside the City's RUSA and/or outside the Critical Water Study Plan (CWSP) area have applied for utilities; and

WHEREAS, requests for utility commitment letters or utility applications from property owners within the proposed Arlington annexation or outside RUSA or the CWSP area have raised questions concerning the City's policy relating to utility services; and

WHEREAS, on August 28, 1995 the Marysville City Council held a public hearing to take public comment and testimony concerning the City's ordinances and policies for service of utilities; and

WHEREAS, said public hearing was well attended and public testimony was received by citizens and property owners who own property both within and outside of the area proposed for annexation to Arlington and/or outside RUSA and/or the CWSP boundary; and

WHEREAS, the City Council received and considered both written and oral testimony and comments and reviewed the entire record of the hearing;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MARYSVILLE, WASHINGTON AS FOLLOWS:

1. The City hereby reaffirms the rules, policies and procedures for applications and connections to the City utility system as set forth in Title 14 of the Marysville Municipal Code.

2. The City will accept and process applications and/or requests for utility commitment letters for utility service for properties within the proposed Arlington annexation area subject to all rules, regulations and requirements set forth in City ordinances and resolutions, including, but not limited to, the requirements that the property owner be able to execute a valid, binding and legally enforceable covenant agreeing to annex to the City of Marysville.

3. The City will accept and process applications for utilities and/or requests for utility commitment letters for properties outside the City's RUSA and/or outside the CWSP boundary on the condition that such properties apply for and receive a variance from Chapter 14.32 of the Marysville Municipal Code and otherwise meet all other rules, regulations and requirements set forth in City ordinances and resolutions.

4. Properties that have signed the annexation petition in favor of the City of Arlington or which have signed both an annexation covenant in favor of Marysville and an annexation covenant in favor of Arlington will be deemed to not be able to meet the requirements of MMC Chapter 14.32 until one of the following occurs:

a. The Arlington City Council denies or rejects the annexation petition.

b. The property owner receives written confirmation from Arlington that its name has been removed from the Arlington annexation petition.

c. A final, non-appealable, legal adjudication has been rendered declaring that the Arlington annexation petition is invalid, null and void.

d. The Boundary Review Board for Snohomish County issues a final, non-appealable decision denying the Arlington annexation.

PASSED by the City Council and APPROVED by the Mayor this 11th day of September, 1995.

CITY OF MARYSVILLE

/s/ David Weiser

ATTEST:
/s/ Mary P. Swenson
CITY CLERK

Approved as to form:

/s/ Grant K. Weed
CITY ATTORNEY

EXHIBIT D

City Administrator

[LOGO]
September 1, 1995

Sent Via Certified, Return Receipt & Regular U.S. Mail

Ralph Monty
Ramo Construction
17215 Smokey Point Drive
Arlington, WA 98223

Dear Mr. Monty:

As a result of the public hearing and subsequent action by the Marysville City Council on August 28, 1995, we are now able to respond to your application for a utility commitment letter.

As you may know, the City Council passed a motion reaffirming its intent to require utility applicants to meet all requirements of the City Code, including, but not limited to the execution of either an annexation covenant or annexation petition in favor of Marysville (see M.M.C. 14.32.040). Any property owner who has previously signed a petition to annex to another jurisdiction would not be able to meet this requirement, at least at this time, and as such, a utility commitment letter cannot be issued.

In the event circumstances change so that you can provide a binding, irrevocable commitment to annex to the city of Marysville, we will reconsider your request.

Enclosed is a copy of Marysville Municipal Code 14.32.040-.060 relating to the criteria, implementation rules, and administrative procedure for utility connections.

Sincerely,

/s/ David Zabell
David K. Zabell
City Administrator

cc: Mayor Dave Weiser
Ken Winckler, Public Works Director

enclosures: 2

EXHIBIT E
SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

VINE STREET COMMERCIAL PARTNERSHIP, a Washington General Partnership; SMOKEY POINT PROPERTIES, a Washington General Partnership consisting of RALPH MONTY and MARYANN MONTY, husband and wife, HENRY R. STAMPF and CINDY STAMPF, husband and wife, J. ROBERT SANDSTROM and KARLENE SANDSTROM, husband and wife, and RON HUITGER, a single man, Petitioners, vs. THE CITY OF MARYSVILLE, a Washington Municipal Corporation, Respondent.	NO. 95-2-07655-4 ORDER DENYING ISSUANCE OF WRIT OF MANDAMUS AND DISMISSING ACTION WITHOUT PREJUDICE (FILED DEC. 27, 1995)

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court upon Petitioners' motion for order to show cause for issuance of writ of mandamus, and Petitioners appearing by and through their attorneys, William B. Foster of Hutchison, Foster & Weigelt and Dennis Jordan of Dennis Jordan & Associates; and Respondent appearing by and through Grant K. Weed of Keithly, Weed and Graafstra,

Inc., P.S.; and the Court having read and considered the following:

1. Petition for Writ of Mandamus;

2. Affidavit of Ralph Monty;

3. Affidavit of J. Brent McKinley;

4. Motion for Order to Show Cause Re: Writ of Mandamus;

5. Petitioners' Memorandum of Authorities and Exhibits attached thereto;

6. Petitioners' Response;

7. Petitioners' Reply Memorandum and Attachment thereto;

8. Answer to Petition for Writ of Mandamus;

9. Marysville's Response to Motion for Order to Show Cause for Writ of Mandamus;

10. Declaration of David Zabell and Exhibits attached thereto;

11. Declaration of David Weiser and Exhibits attached thereto;

12. Declaration of Grant K. Weed;

13. Supplemental Memorandum of Authorities.

The Court having reviewed the above-referenced pleadings and documents and having heard the oral argument of the parties and having been fully advised in the premises;

The Court hereby finds that Petitioners have failed to exhaust their administrative remedies.

IT IS HEREBY ORDERED that Petitioners' application for issuance of a writ of mandamus is hereby DENIED, ~~and this case is DISMISSED WITHOUT PREJUDICE~~ /s/ JAT.

DONE IN OPEN COURT this 27th day of December, 1995.

/s/ Joseph A. Thibodeau
JUDGE JOSEPH A. THIBODEAU

Presented by:

KEITHLY, WEED AND GRAAFSTRA, INC., P.S.

By Grant K. Weed
GRANT K. WEED, WSBA #11243
Attorney for Respondent

Approved for entry; notice
of presentation waived:

DENNIS JORDAN & ASSOCIATES

By _____
DENNIS JORDAN, WSBA #04904
Attorney for Petitioner
Smokey Point Properties

HUTCHISON, FOSTER & WEIGELT

/s/ William Foster
WILLIAM B. FOSTER, WSBA #08270
Attorney for Petitioner Vine Street
Commercial Partnership

EXHIBIT F

HUTCHISON, FOSTER & WEIGELT
ATTORNEYS AT LAW
20006 CEDAR VALLEY ROAD, SUITE 101
POST OFFICE BOX 69
LYNNWOOD, WASHINGTON 98046-0069

R. SCOTT HUTCHISON
WILLIAM B. FOSTER*
EDWARD P. WEIGELT, JR., P.S.
JEFFREY P. GILBERT

*ALSO ADMITTED TO PRACTICE IN OREGON

TELEPHONE
(206) 776-2147
(206) 776-2148
FAX
(206) 776-2140

January 4, 1996

Ms. Mary Swenson
City of Marysville
514 Delta Avenue
Marysville, Washington 98270

Re: **Vine Street Commercial Partnership Utility Commitment Letter**
Property Address: 3704 - 172nd Avenue N.E., Arlington, Washington
Assessors Account No.: 283105-2-062-0007

Dear Ms. Swenson:

Please be advised that the undersigned represents Vine Street Commercial Partnership, the owner of the above-described property. Enclosed herein please find an original Application for Utility Commitment Letter, and attachments, with regard to the said property.

Although your form indicates that it should be accompanied by an executed annexation covenant, I have not included that herein, My client has executed an annexation petition to annex the property to the City of Arlington, and therefore is not able to execute an annexation covenant in favor of the City of Marysville. Although my client does not believe that it is required to execute such a covenant, insofar as the City of Marysville requires the same, my client would respectfully request a variance from the requirement that it be required to execute the annexation covenant.

I look forward to your response to this Application at your earliest convenience. If you have any further questions or comments, please do not hesitate to contact the undersigned.

Very truly yours,

HUTCHINSON, FOSTER & WEIGELT

/s/ William Foster
William B. Foster

cc: Enclosure

EXHIBIT A

LEGAL DESCRIPTION

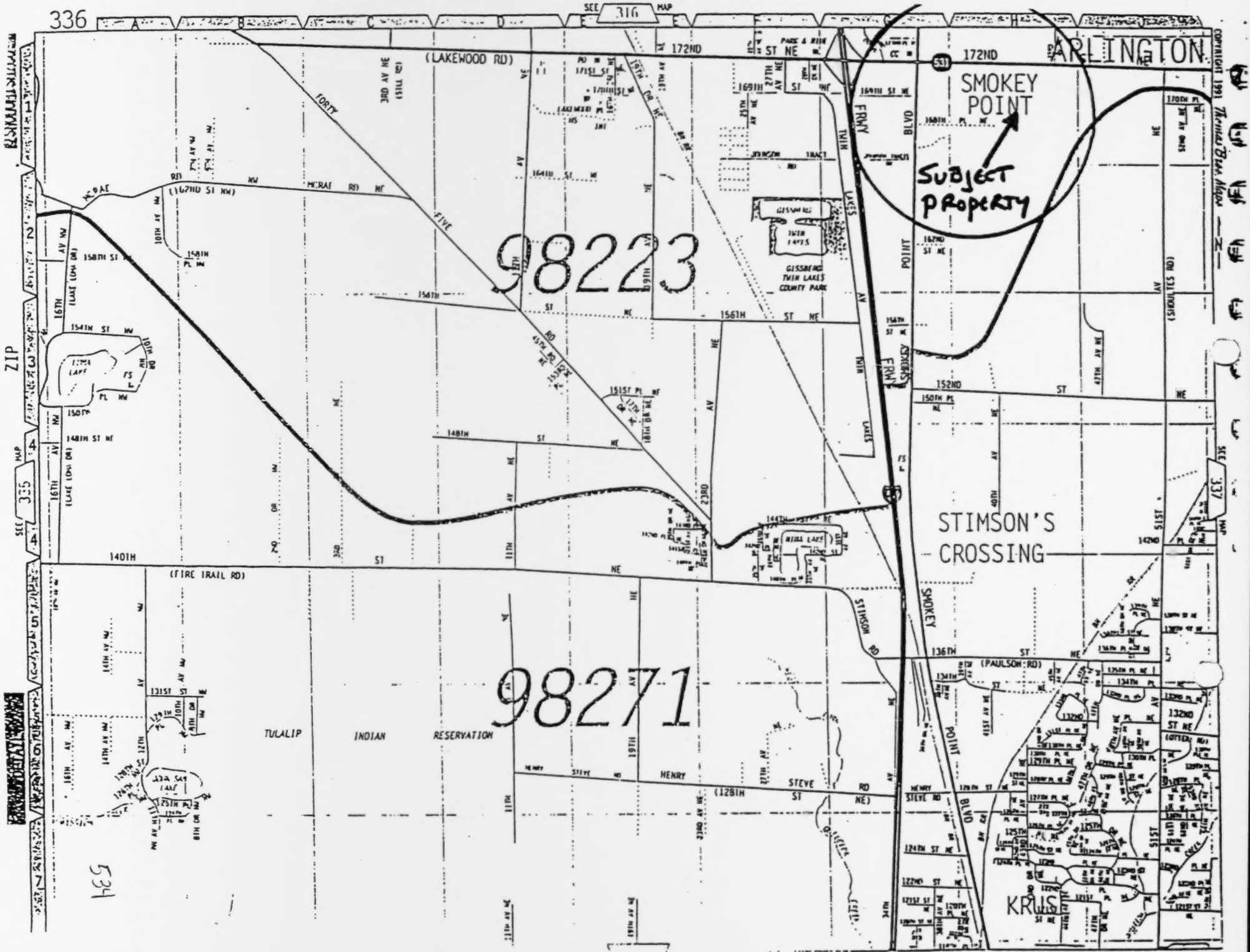
The north 3/8 of the following described property: The northeast quarter of the southeast quarter of the northeast quarter and the east 16 feet of the northwest quarter of the southeast quarter of the northeast quarter, all in section 29, township 31 north, rage [sic] 5 east, W.M.,

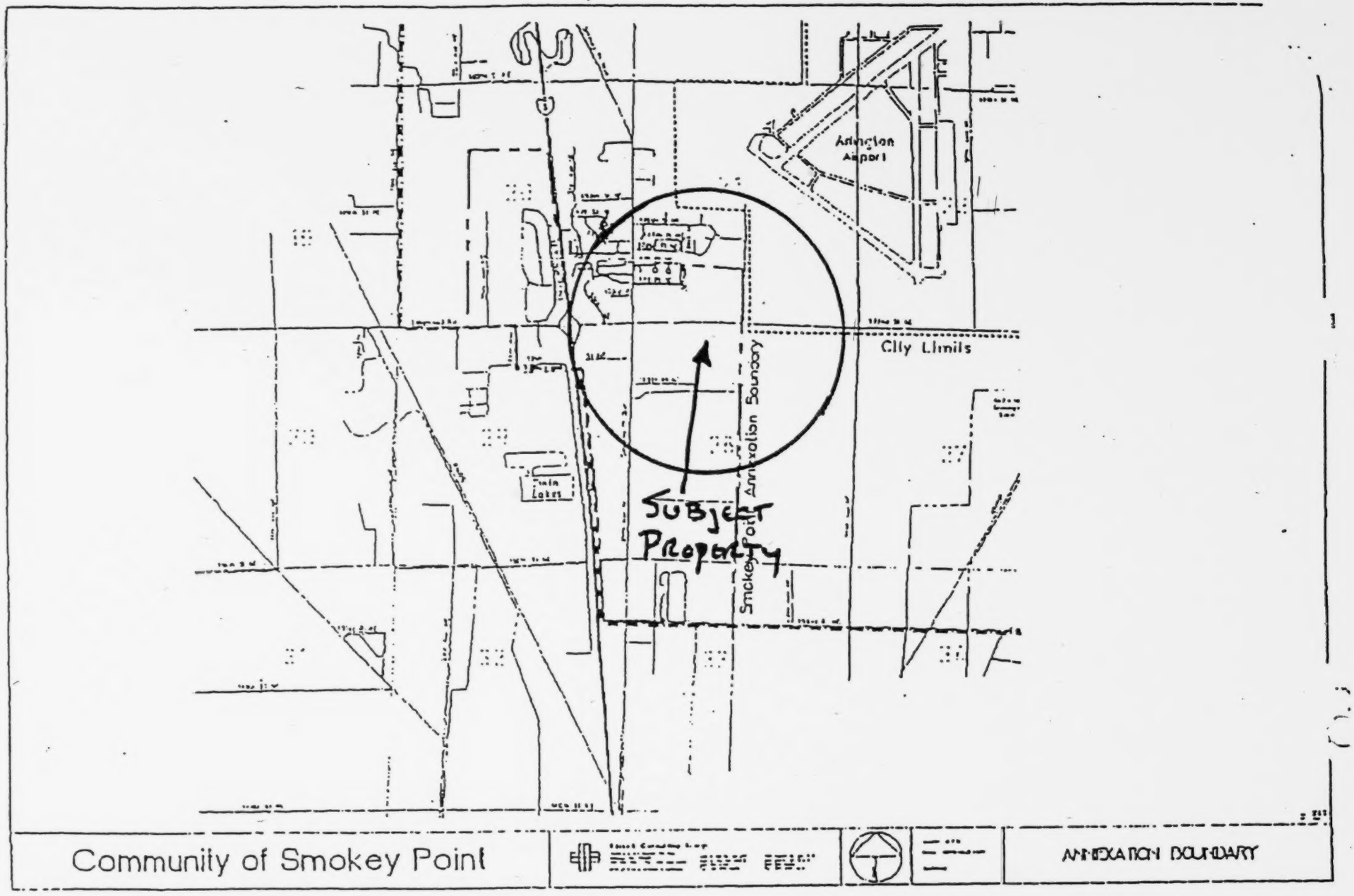
Except the east 30 feet thereof for State highway.

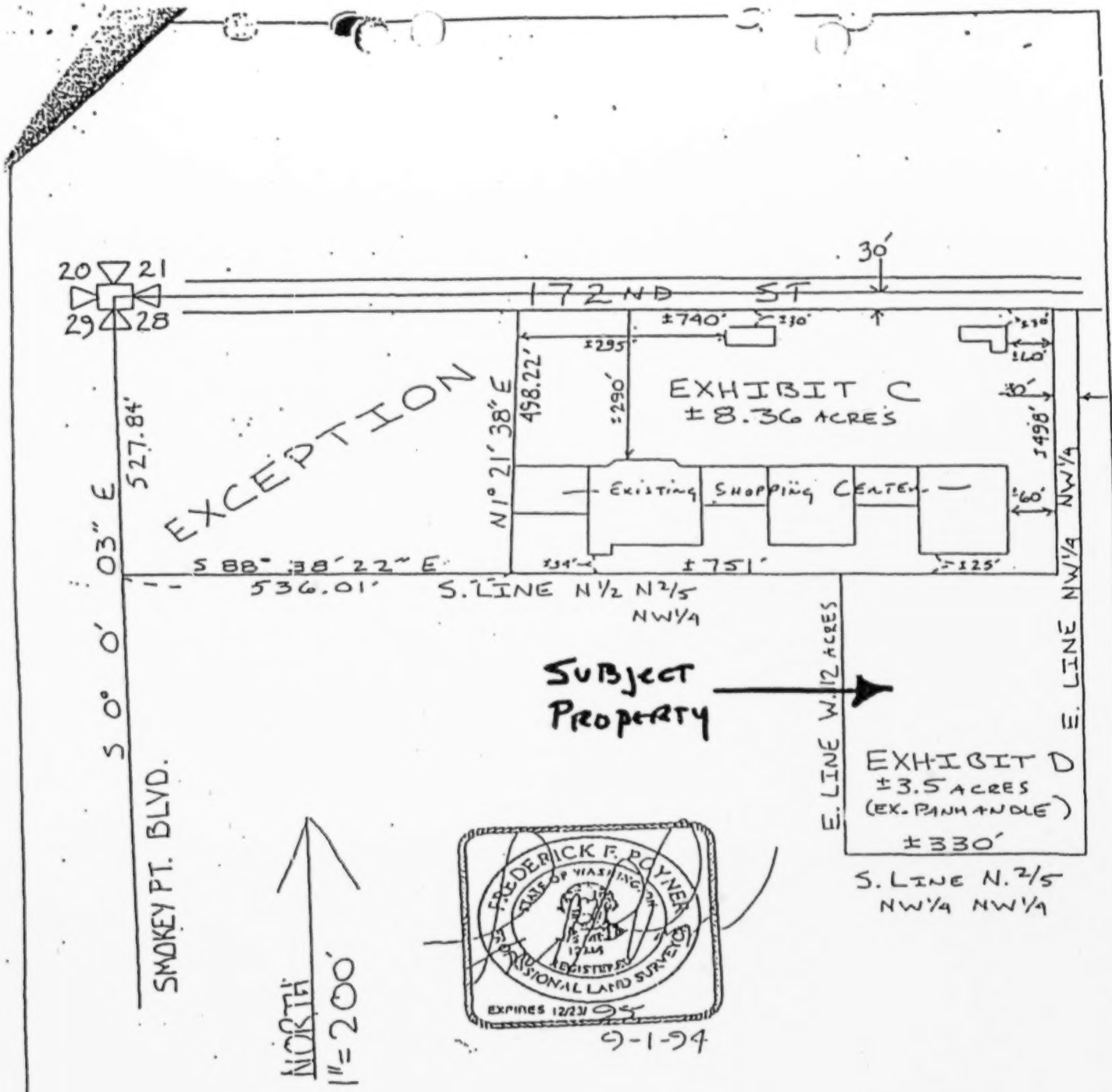
Except all that portion thereof, described as follows: Commencing at the northeast corner of said subdivision 30.02 feet 84°09'08" east along the north line of said subdivision 30.02 feet to the west line of county road and the true point of beginning; Thence southerly along the west line of said county road 212.75 feet; Thence west parallel to the north line of northeast quarter of the southeast quarter of the northeast quarter of said section 29, a distance of 204.75 feet; Thence north parallel to the west line of said county road 212.75 feet to intersection with the north line of said northeast quarter of the southeast quarter of the northeast quarter; Thence east along said north line 204.75 feet to the true point of beginning.

Situate in Snohomish County, State of Washington.

Which property is commonly known as 3704 – 172nd Avenue N.E., Arlington, Washington.


SEE 316 MAP
336
ARLINGTON
SMOKEY POINT
SUBJECT PROPERTY
98223
98271
STIMSON'S CROSSING
TULALIP INDIAN RESERVATION
(LAKEWOOD RD)
(167TH ST NW)
(FIRE TRAIL RD)
(128TH ST NE)
(PAULSON RD)
SMOKEY POINT BLVD
FRWY
172ND ST NE
152ND ST NE
136TH ST NE
140TH ST NE
148TH ST NE
156TH ST NE
1561H ST NE
1401H ST NE
GISSBERG TWIN LAKES COUNTY PARK
KRUSE
SEE 335 MAP
SEE 337 MAP
ZIP
534


Arlington Airport
City Limits
Smokey Point Annexation Boundary
SUBJECT PROPERTY
Community of Smokey Point
ANNEXATION BOUNDARY



AFTER CONVEYANCE

This map is based upon information of record and is not a representation of an actual field survey.

JOB NO.: 10979	DATE: 8-22-94	DWN. BY: KFM
PORT'N NW1/4 NW1/4 SEC. 28 TWP 31N. R5E.		

BOUNDARY LINE ADJUSTMENT
VINE STREET

Engineers Surveyors Planners

CASCADE SURVEYING AND ENGINEERING, Inc.

ARLINGTON, WA.

EXHIBIT G

CITY OF MARYSVILLE
APPLICATION FOR UTILITY VARIANCE

DATE OF APPLICATION: January 26, 1996

APPLICANT: Vine Street Commercial Partnership
(name)

P.O. Box 430, Arlington, Washington 98223-0430
(mailing address)

PHONE: (360) 435-8625

DESCRIPTION OF PROPERTY TO BE CONNECTED TO CITY UTILITIES (Address or legal Description):
3704 – 172nd Avenue, N.E. (Legal Description Attached as Exhibit "A"

Property Tax I.D. No. 283105-2-062-0007

NO. OF CONNECTION:
Sewer 1 Water 2 Meter Size ___
*1 Water, 1 Fire

DESCRIPTION OF STRUCTURE OR DEVELOPMENT (Indicate type of land use, occupancy classification and number of units):
Movie Theater

IS PROPERTY WITHIN:

CITY LIMITS?	___
RURAL UTILITY SERVICE AREA?	xx
A UTILITY LOCAL IMPROVEMENT DIST.?	xx
C.W.S.P. BOUNDARY?	___
URBAN GROWTH BOUNDARY?	xx

ZONING CLASSIFICATION: _____

COMPREHENSIVE PLAN CLASSIFICATION: _____

R.U.S.A. CLASSIFICATION: _____

TYPE OF VARIANCE REQUESTED:

___ Water connection without sewer connection

___ Sewer connection without water connection

___ Property outside of RUSA boundary

___ Land use in violation of RUSA Plan or Comp Plan

xx Other (Please specify) Variance from requirement that property owner execute annexation covenant

The City Council is authorized to issue a variance only if it found that literal enforcement of the City codes would cause practical difficulties or unnecessary hardship. No variance shall be authorized unless the City Council finds that all of the following facts and conditions exist:

1. That there are exceptional or extraordinary circumstances or conditions applying to the subject property or as to the intended use thereof that do not apply generally to other properties in the same vicinity.
2. That the variance is necessary for the preservation and enjoyment of a substantial property right of the applicant possessed by owners of there [sic] properties in the same vicinity.
3. That the authorization of the variance will not be materially detrimental to the public interest, welfare or the environment.
4. That the granting of the variance will not be inconsistent with the long-range plans of the City utility system, or

jeopardize utility availability for properties within the City limits.

STATE ALL FACTS AND ARGUMENTS SUPPORTING THIS VARIANCE APPLICATION.

See Attached Exhibit "B"

\$50.00 filing fee received by the City

on _____(date)

by _____

William Foster

William B. Foster, Agent for Vine Street Commercial Partnership

(signature of applicant)

IT WOULD BE ADVISABLE THAT THE APPLICANT APPEAR BEFORE THE CITY COUNCIL FOR THE PURPOSE OF PRESENTING THIS VARIANCE APPLICATION.

EXHIBIT A

LEGAL DESCRIPTION

The north 3/8 of the following described property: The northeast quarter of the southeast quarter of the northeast quarter and the east 16 feet of the northwest quarter of the southeast quarter of the northeast quarter, all in section 29, township 31 north, rage [sic] 5 east, W.M.,

Except the east 30 feet thereof for State highway.

Except all that portion thereof, described as follows: Commencing at the northeast corner of said subdivision 30.02 feet 84°09'08" east along the north line of said subdivision 30.02 feet to the west line of county road and the true point of beginning; Thence southerly along the west line of said county road 212.75 feet; Thence west parallel to the north line of northeast quarter of the southeast quarter of the northeast quarter of said section 29, a distance of 204.75 feet; Thence north parallel to the west line of said county road 212.75 feet to intersection with the north line of said northeast quarter of the southeast quarter of the northeast quarter; Thence east along said north line 204.75 feet to the true point of beginning.

Situate in Snohomish County, State of Washington.

Which property is commonly known as 3704 – 172nd Avenue N.E., Arlington, Washington.

EXHIBIT "B"

VINE STREET COMMERCIAL PARTNERSHIP, a Washington General Partnership, ("Applicant") hereby makes application for a variance from Marysville Municipal Code § 14.32 et seq, which section requires, inter alia, that any property owner making application for sewer and/or water service from the City of Marysville for property located outside the City of Marysville execute an annexation covenant in favor of the City of Marysville. This application for variance is based upon the following:

1. **Circumstances Applying to Subject Property**. The Applicant is the owner of that parcel of real property described in the foregoing Application, the common

address of which property is 3704 – 172nd Avenue N.E., Arlington, Washington. The property is located within the boundaries of ULID # 1, as established by Ordinance enacted by the City of Marysville. The assessments levied under the said ULID have been fully paid. The property is approximately 3.5 acres in size.

2. **Necessity for Variance.** The property is adjacent to the Gateway Shopping center and is designated for commercial development. The adjoining properties have been so developed. Development of this property in a manner consistent with its use as designated by its current zoning classification, and its comprehensive plan designation requires that the property be served by sanitary sewers and public water. Public water is required for both consumption uses and fire protection. Most of the properties located in the immediate vicinity, including, but not limited to the adjacent Gateway Shopping Center are currently served by both sanitary sewer and public water, both of which are provided by the City of Marysville. Unless and until these utilities are provided to the subject property, as they are provided to the neighboring properties, the property owner will be prevented from developing the property in a manner consistent with its designated use, and consistent with the use of the neighboring properties. Prohibition from development impairs a substantial property right belonging to the property owner.

3. **Public Interest.** Providing the requested utilities to the subject property will not be materially detrimental to the public interest, welfare, or the environment. In fact, providing these utilities to the property will be beneficial to the public interest and environment in the following respects:

a. Public water will provide assurance of an adequate, pure water supply to the eventual customers of the proposed development. Furthermore, public water will insure adequate water flow for fire protection, which is beneficial to the property owner, the ultimate users of the property, and to the neighboring properties. Public water will further accommodate adequate flow for sanitary sewer.

b. Sanitary sewer will promote and insure the clean and efficient disposal of waste created on the property.

Providing either of these services would not impose a burden upon the City of Marysville. To the contrary, the City of Marysville has heretofore indicated in testimony presented at a Boundary Review Board hearing that the City of Marysville has the capacity to provide these services to this and other property in the area immediately. As a provider of utility service, the City of Marysville would further be able to maintain control over the Applicant's use of the utilities, including the effluent discharged into the system.

4. **Consistent with City Long Range Plans.** Ever since the early 1970's, the City of Marysville has followed a policy of providing utilities to the area in which this property is located. This policy is codified in a number of ordinances, including, but not limited to, ULID # 1. In furtherance of this policy, the City of Marysville has constructed both sewer and water mains which are presently located adjacent to the property. As a result of those utility connections, the City of Marysville has collected substantial collection charges, and normal and customary service charges as a result of providing the requested service.

The Applicant further submits that it has a vested contract right for utility service as a result of the enactment of ULID # 1, and the Applicant's performance of all of its obligations under that ordinance.

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

VINE STREET COMMERCIAL PARTNERSHIP, a Washington General Partnership; SMOKEY POINT PROPERTIES, a Washington General partnership consisting of RALPH MONTY and MARYANN MONTY, husband and wife; HENRY R. STAMPF and LYNDI STAMPF, husband and wife; J. ROBERT SANDSTROM and KARLENE SANDSTROM, husband and wife, RON HUITGER, a single man; Petitioners, vs. THE CITY OF MARYSVILLE, a Washington Municipal Corporation, Respondent.	NO. 95-2-07655-4 **ORDER GRANTING PETITIONERS LEAVE TO AMEND PETITION**

THIS MATTER having come on regularly for hearing before The Honorable Linda C. Krese, Judge of the above-entitled Court upon the Petitioners' Motion for an Order Granting Leave to Amend Petition; the Petitioners appearing by and through their attorneys, William B. Foster of Hutchison, Foster & Weigelt and Dennis K. Jordan Inc., P.S.; the Respondents appearing by and through their attorneys, Grant K. Weed of Keithly, Weed & Graafstra and Michael

C. Walter of Keating, Bucklin & McCormack, P.S.; the Court having read and considered the records and files herein, and considering itself fully advised in the premises; IT IS NOW, THEREFORE,

ORDERED, ADJUDGED AND DECREED that the Petitioners, VINE STREET COMMERCIAL PARTNERSHIP and SMOKEY POINT PROPERTIES (a partnership composed of the Petitioners Monty, Stampf, Sandstrom and Huitger) shall be, and they are hereby, granted leave to amend their Petition filed in the above entitled action to include a cause of action for damages under the provisions of R.C.W. 60.40 et. seq., and 42 U.S.C.A. § 1983; and it is further

ORDERED, ADJUDGED AND DECREED that the Respondent, City of Marysville, shall be entitled to assert any and all affirmative defenses which may be available to it by the filing of an Amended Response to the Amended Petition [and that granting of this motion does not resolve the issue of relation back of the amendment /s LCK]

DONE IN OPEN COURT this 8th day of November, 1996.

/s/ Linda C. Krese
The Honorable Linda C. Krese, Judge

Presented by:

/s/ William B. Foster
William B. Foster WSBA #8270
of Hutchison, Foster & Weigelt
Attorneys for Petitioner,
Vine Street Commercial Partnership

(2)

No. 04-287

Supreme Court, U.S.
FILED
OCT 2 8 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CITY OF MARYSVILLE, WASHINGTON,

Petitioner,

v.

VINE STREET COMMERCIAL PARTNERSHIP, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Washington, Division I

BRIEF IN OPPOSITION

WILLIAM B. FOSTER
Counsel of Record
HUTCHISON & FOSTER
4300 – 198th Street S.W.
P.O. Box 69
Lynnwood, Washington 98046-0069
Telephone: (425) 776-2147
Facsimile: (425) 776-2140

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT

The Respondents are owners of property located outside of the boundaries of the Petitioner, City of Marysville. In 1971 the Petitioner, pursuant to authority duly adopted, formed a Utility Local Improvement District ("ULID"), and the Respondents' properties were included in the area encompassed by this ULID. As part and parcel of the ULID, the Petitioner installed the utilities contemplated by the ULID, and after completion of the installation assessed each of the properties included in the ULID area, including the Respondents' properties. At the time the ULID was formed and approved by the legislative body of the Petitioner, the assessments became a lien upon the Respondents' properties, which the Petitioner had the authority to enforce through collection in the event the assessment was unpaid.

After the formation of the ULID, the Petitioner enacted an ordinance that required as a condition of providing utility service to properties outside of the city limits the property owner would be required to either annex to the Petitioner city, or in the alternative, sign a covenant agreeing not to protest future annexation (the "Annexation Requirement"). The Petitioner contended that the ordinance applied to the Respondents' properties.

After the Respondents had paid the assessments levied under the ULID in full, the Respondents sought utility service from the Petitioner, which request was denied. The Petitioner justified its refusal to provide the requested service because the Respondents had executed an annexation petition to a neighboring city, and therefore could not comply with the Petitioner's Annexation Requirement.

The Respondents' objected to this refusal claiming a contract right based upon the ULID, and further contending

that the later enactment of the ordinance adding a new condition constituted an unconstitutional impairment of that contract right in contravention of the Contract Clause contained in both the United States Constitution and Washington State Constitution. After the Petitioner reversed its position, and agreed to provide utility service to the Respondents, the Respondents commenced an action against the Petitioner to recover damages for breach of contract, as well as a claim under Section 1983.[1]

In addition to the procedural history reported by the Petitioner, the Petitioner sought discretionary review of both Court of Appeals' decisions to the Washington Supreme Court, and on each occasion review was denied.

At present the case is on remand to the Superior Court of the State of Washington for a determination of the Respondents' damages resulting from the unlawful impairment of their contract right. The Respondent, Vine Street, claims damages based upon its inability to develop its property without the utility connection that was wrongfully denied.

REASONS FOR DENYING THE PETITION

1. The Decision of the Lower Court is not in Conflict with a Previous Decision of this Court.

The Petitioner contends that the decision of the court below is in direct conflict with a decision of this Court, *Carter v. Greenhow*, 114 U.S. 317 (1885). The City contends

[1] In the instant case, the Court of Appeals acknowledged that the plaintiffs have properly pled a § 1983 case. See *Decision of Court of Appeals in Vine Street II*, page 11.

that this case "plainly stated that an action for damages is not available to a plaintiff for unconstitutional impairment of a contract right."[2] However, under plain reading of *Carter*, and as seen in subsequent decisions, that is not the holding of *Carter*.

More importantly for this Court's consideration, however, is whether a real conflict exists between the decisions of this Court, and the decision in the Court below. The respondent respectfully submits that no conflict exists after the decision in *Dennis v. Higgins*, 498 U.S. 439, 443, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991). As this Court stated in *Dennis*:

> "This case presents the question whether suits for violations of the Commerce Clause may be brought under 93 Stat. 1284, as amended, 42 U.S.C. § 1983. ***We hold that they may.***" (emphasis added) *Id.* at 440.

This Court further stated:

> "As the Supreme Court of Nebraska recognized, see 234 Neb., at 430, 451 N.W. 2d., at 678, there is a division of authority on the question whether claims for violations of the Commerce Clause may be brought under § 1983. We granted certiorari to resolve this issue, 495 U.S. 956 (1990), and we now reverse."[3]

Accordingly, the very reason that this Court accepted review in *Dennis* was to resolve the very question that the

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[2] Petition at 11.

[3] The lower court in *Dennis* dismissed the petitioner's Section 1983 claims.

Petitioner contends is yet unresolved. The Respondents submit that *Dennis* resolved the issue once and for all.

2. A Plaintiff Whose Contract Is Breached as a Result of the Enactment of Legislation in Violation of the Contracts Clause has a Cause of Action under Section 1983.

Section 1983 protects an extremely broad range of rights guaranteed by the United States Constitution and federal law:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the derivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. . . . " 42 U.S.C. § 1983.

The broad range of rights guaranteed by Section 1983 was recognized by the *Dennis* court:

> "A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of "*any* rights, privileges, or immunities secured by the Constitution and laws. Accordingly, we have repeatedly held that the coverage of [§ 1983] must be broadly construed."[4] (emphasis in original)

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[4] *Id* at 443, Citing *Golden State Transit Corp v. Los Angeles*, 493 U.S. 103, 105 (1989).

The legislative history of Section 1983 also stresses that as a remedial statute, it should be liberally and beneficently construed against all forms of official violation of federally protected rights.[5] As noted in *Dennis*, this court has rejected attempts to limit the types of constitutional rights that are encompassed within the phrase "rights, privileges, or immunities." This Court has refused to limit the phrase to "personal" rights, as opposed to "property" rights.[6]

The respondents in *Dennis* argued that the Commerce Clause was nothing more than a power allocating provision, whereby Congress is given the pre-emptive authority over the regulation of interstate commerce. The logical conclusion, then, that would follow from such an argument is that the redress is limited to a declaration that the states' intrusion into an area pre-empted by Congress would be to declare the state action void. However, this Court in *Dennis* recognized that the Commerce Clause does more than confer supreme authority on the Federal Government; it is also a "substantive restriction on permissible state regulation."[7] This substantive restriction not only entitles the aggrieved party to seek and obtain declaratory and injunctive relief avoiding the impermissible legislation, but also entitles that party to obtain "retrospective relief 'that will cure any unconstitutional discrimination'"[8] resulting from the improper legislation.

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[5] *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 684 (1978).

[6] *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

[7] *Dennis* at 447.

[8] *Dennis* at 447.

The retrospective relief to which the aggrieved party is entitled are the damages that result from the enactment of the oppressive legislative act. Accordingly, the combined restriction on state power and entitlement to relief amount to a "right, privilege, or immunity" under the ordinary meaning of those words.[9]

Admittedly, this does not mean that all federal statutes confer a "right" within the meaning of Section 1983. This Court established three (3) considerations for determining whether a "right" has been conferred.[10] The *TM Park*[11] court then continued, stating that the very factors stated in *Golden State* weigh in favor of finding a cause of action under Section 1983 as a result of a Contract Clause violation. First, the Contract Clause does not express a mere "preference" for certain types of treatment, but instead creates a binding obligation on the part of government to refrain from enacting legislation that impairs contract.[12] Secondly, the plaintiffs have a "concrete," as opposed to a "vague and amorphous" right. Thirdly, the Contract Clause was clearly intended to benefit parties to the contract in question, without which benefit the parties to the contract would be unable to avail themselves of the limitations imposed upon legislation, and the corresponding right of

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[9] *Dennis* at 447.

[10] *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989).

[11] *TM Park Ave. Assocs. v. Pataki*, 44 F. Supp. 2d 158 (N.D.N.Y. 1999).

[12] *TM Park* at 163.

action that to those injured by legislation that exceeds those limitations.[13]

The Petitioner argues that *Carter* remains as viable authority for the proposition that the only remedy available for claimed violations of the Contract Clause is the declaration that the legislation declaring the legislation invalid, and that no substantive damage claim is allowed. However, *Carter* was distinguished in a significant line of cases commencing nearly immediately following the decision itself. *Carter* was distinguished as a matter of pleading as early as 1939,[14] and prior to the decision in *Dennis* as recently as 1979.[15] Following those decisions this Court in *Dennis* expressly distinguished *Carter*, and concluded that the petitioner's Commerce Clause claim could be brought under Section 1983.[16] In so doing, this Court plainly stated that the Commerce Clause does confer "rights, privileges, or immunities" within the meaning of Section 1983.

Subsequent decisions of other courts have followed the holding of *Dennis*. In 1999 the District Court of New York held that a violation of the Contract Clause would give rise to a claim under Section 1983.[17] In *TM Park* the court, like the court in *Dennis*, recognized that the decision in *Carter* was limited to a matter of pleading, that is, *Carter* was

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[13] *Id.* at 163.

[14] *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 527 (1939) (opinion of Stone, J.).

[15] *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613, n. 29 (1979).

[16] *Dennis* at 451.

[17] *TM Park Ave. Assocs. v. Pataki*, 44 F. Supp. 2d 158 (N.D.N.Y. 1999); *reversed on other grounds*, 214 F.3d 344 (2000).

pled as a breach of contract claim, and did not seek redress for a deprivation of a right secured to the plaintiff under a clause of the Constitution "to which he had 'chosen not to resort.'"[18] In fact, the implicit holding of *TM Park* is that had the plaintiff in *Carter* sought redress under this Constitutional provision, relief could have been afforded under Section 1983.[19] As succinctly stated by the court in *TM Park*:

> "In other words, because *Carter* failed to plead that he was deprived of a right guaranteed to him by the Contract Clause, he did not state a claim under § 1983. Accordingly, it becomes apparent that the *Carter* court did not hold that § 1983 was not a proper avenue to redress a violation of the Contract Clause, but only that the facts in *Carter's* complaint failed to show a cause of action within § 1983's terms."[20]

The court in *TM Park* then continued following the analysis of *Dennis*, noting that the factors cited in *Golden State* weigh in favor of recognizing a cause of action under Section 1983.[21]

Further support for the conclusions reached in both *Dennis* and *TM Park* is the Ninth Circuit's decision in *Southern California Gas v. City of Santa Ana*, 336 F.3d

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[18] In *Carter* the petitioner's claim was dismissed as the amount in controversy was below the jurisdictional threshold of the court. The only remaining contention which would permit the court to retain jurisdiction would be a violation of a Federal Statute, which the court found had not been properly pled.

[19] *TM Park* at 162.

[20] *TM Park* at 162 (emphasis added).

[21] *TM Park* at 163.

885 (July, 2003), wherein it was held that a 42 U.S.C. § 1983 claim can be based solely upon a violation of the Contract Clause of Article 1, Section 10 of the U.S. Constitution:

> "The Gas Company's complaint specifically stated that its Contracts Clause claim was 'brought pursuant to 42 U.S.C Section 1983 and related California law.' The City's argument that section 1983 provides no relief for a party deprived its rights under the Contracts Clause is without merit. Section 1983 provides for liability against any person acting under color of law who deprives another 'of any rights, privileges, or immunities secured by the Constitution and laws' of the United States. 42 U.S.C. Section 1983. The rights guaranteed by section 1983 are 'liberally and beneficently construed.' *Dennis v. Higgins*, 498 U.S. 439, 443, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991) (quoting *Monell v. Department of Social Services*, 436 U.S. 658, 684, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). ***The right of a party not to have a State, or a political subdivision thereof, impair its obligations of contract is a right secured by the first article of the United States Constitution. A deprivation of that right may therefore give rise to a cause of action under section 1983.***"[22]

Just as in *Dennis*, the court in *TM Park* recognized that the Contract Clause, like the Commerce Clause in *Dennis* "confers a right, privilege, or immunity because it is a

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[22] *Southern California* at 886-887 (emphasis added).

substantive restriction on permissible state legislation that would impair the obligation of contracts."[23]

In addition, the Ninth Circuit also held that the Supreme Court's decision in *Carter v. Greenhow* "is not to the contrary":

> "The Supreme Court has explicitly given *Carter* a narrow reading and rejected the interpretation advanced by the City. *See Dennis*, 498 U.S. at 451 n. 9, 111 S. Ct. 865 (stating that *Carter* can only be read to have "held *as a matter of pleading* that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the right secured to him by that clause of the Constitution [the Contract Clause], to which he had chosen not to resort." (emphasis added) (internal quotations and citations omitted).[24]

As noted by the *TM Park* court,[25] " . . . [a] number of courts, while not specifically addressing whether or not a Contract Clause claim is actionable pursuant to Section 1983, impliedly accepted the position that it is by allowing Contract Clause claims to proceed under Section 1983."[26]

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[23] *TM Park* at 163.

[24] *Southern California* at 886-887.

[25] *TM Park* at 164.

[26] See, e.g., *For Your Eyes Only, Inc. v. City of Columbus*, 281 F.3d 1209, 1212 (11th Cir. 2003); *Picard v. Members of the Employee Ret. Bd.*, 275 F.3d 139, 142 (1st Cir. 2001); *Shaffer v. Schenectady City Sch. Dist.*, 245 F.3d 41, 42 (2d Cir. 2001); *Kendall-Jackson Winery, Ltd. v. Branson*, 212 F.3d 995, 996 (7th Cir. 2000); *Larsen v. Senate of the C'wealth*, 154 F.3d 82, 86 (3d Cir. 1999); *Smith v. City of Enid*, 149 F.3d 1151, 1154 (10th Cir. 1998); *Carroll v. City of Mount Clemens*, 139 F.3d 1072, 1074 (6th Cir. 1998); *Heart of Am. Grain Inspection Serv. v. Missouri Dep't of*

(Continued on following page)

To the contrary, the Petitioner relies upon two cases in support of its contention that a Contract Clause violation will not support a Section 1983 claim, *United States v. Winstar*[27] and *Andrews v. Anne Arundel County.*[28] However, in *Winstar* the issue was not presented to this Court, and Andrews was criticized by the decision in *TM Park*.

Turning first to *Winstar*, the primary distinguishing feature is that this case did not involve a § 1983 claim at all. In *Winstar* the plaintiffs were three different thrift institutions that claimed to be the beneficiaries of contracts with the Government, and that regulations adopted subsequent to the contract formation prevented the Government from performing its contractual obligations. The plaintiff claimed simply that the Government's subsequent inability to perform its contractual obligations amounted to a breach of contract, nothing more, nothing less. The plaintiff institutions did not claim damages under Section 1983 as a result of the constitutional impairment, but instead, like in *Carter*, simply sought breach of contract damages.

The government defended the thrifts' claims arguing the "unmistakability" doctrine; that is, that the government has not surrendered its right to alter previous legislation by subsequent legislation unless that intent is "unmistakably" apparent in the former legislation. Therefore, unless the government has unmistakably surrendered

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Agric., 123 F.3d 1098, 1106 (8th Cir. 1997); *Kestler v. Board of Trustees of N.C. Local Gov'tl Employees' Retirement Sys.*, 48 F.3d 800, 801 (4th Cir. 1993).

[27] 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996).

[28] 931 F. Supp. 1255 (D. Md.1996).

the right to enact future legislation, then the government is not constrained from doing so. However, this doctrine has little to do with the government's contractual liability if the subsequent changes prevent the government from performing previously existing contractual obligations. In short, *Winstar* does not say that the government cannot enact legislation that impairs existing contracts, but that it must bear the burden of doing so if its performance under those existing contracts is prevented as a result of that legislation. Citing *Holmes*,[29] what the promissor does is not insure that the promise will be fulfilled, but instead he assumes the risk (as measured in damages) that the promise will be fulfilled.[30] In *Winstar* the plaintiffs did not claim that the previous regulations could not be changed, nor did they claim that the new regulations did not apply to them, but instead that in making the promise the government assumed the risk that as a result of subsequent legislation, or for other reasons, that it would be unable to perform on its previous promise. A contract always involves a promise to provide something that is beyond the promissor's absolute control.[31]

The reference to *Carter* in *Winstar* that is cited by the Petitioner is actually in a footnote in the majority opinion, the text of which was intended as a criticism of Justice Scalia's own theory of unmistakability " . . . [w]hich would

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[29] *Winstar* at 869.

[30] In his dissent in *Winstar*, Justice Scalia also cites *Holmes*, stating that a contract is not a "guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance." *Winstar* at 919 (Scalia, J.).

[31] *Winstar* at 868-869; see also *Day v. United States*, 245 U.S. 159, 161 (1917).

apply in a wide range of cases and so create some tension with the general principle that the Government is ordinarily treated just like a private party in its contractual dealings."[32] The majority observed that Justice Scalia's theory of unmistakability would apply in a wide range of cases which would be satisfied by an inference of fact, and would result in a low barrier to constitutional litigation. Justice Scalia observed that aggrieved parties would have a common law contract remedy, citing *Holmes*. The citation to *Carter* by the majority is merely to point out that remedies other than damages, such as specific performance, may be available to aggrieved plaintiffs. In that context, the majority cites *Carter*, for the proposition that a plaintiff could seek, *in lieu of damages*, "to have a judicial determination declaring the nullity of the attempt to impair the contract obligation"[33] which is exactly what the Court in *Dennis* limited the *Carter* holding to because of the *Carter's* failure to plead a damage claim under Section 1983.[34]

In the end, however, both the *Winstar* majority and Justice Scalia reached the same conclusion, i.e., the government is liable to the plaintiffs for the damages that resulted from the government's enactment of the subsequent legislation that impaired previously existing contracts. However, neither *Carter* nor *Winstar* stand for the proposition that a violation of the Contract Clause does not constitute a deprivation of "rights, privileges, or

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[32] *Winstar* at 887.

[33] *Winstar* at 887.

[34] A further distinction is the fact that *Winstar* did not include a Section 1983 claim, but only a claim for damages based upon the government's breach of contract.

immunities," which will give rise to a cause of action under Section 1983. Because a Section 1983 claim was not made in either case, this issue was simply not before the court. To the contrary, the issue of a Section 1983 claim for a violation of the Commerce Clause was squarely before this Court in *Dennis*, and this Court held, in no unmistakable terms, that when properly pled a violation of the Commerce Clause would support a Section 1983 claim.

However, and most importantly, *Winstar* actually supports the position of the Respondent. Although most of the cases addressing the propriety of a breach of contract action arising out of an unconstitutional impairment involve a Section 1983 claim, as pointed out above, this was not the case in *Winstar*. In *Winstar* the plaintiffs did not assert a Section 1983 claim, but instead made a common law breach of contract claim.[35] In affirming the lower court, this court applied the ordinary principles of contract construction and breach that would be applicable to any contract action between private parties.[36]

Winstar is just like the case before the court. In *Winstar*, the subsequent legislation left the government unable to perform its contractual obligation to accept the previously accepted capital requirements. It did not mean that the government could not change these requirements,

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[35] "Believing that the Bank Board and FSLIC had promised them that the supervisory goodwill created in their merger transactions could be counted toward regulatory capital requirements, respondents filed suit against the United States in the Court of Federal Claims, seeking monetary damages on both contractual and constitutional theories." The lower court granted the Respondents' motion for summary judgment holding that the Government had breached its contractual obligations. *Winstar* at 858.

[36] *Winstar* at 871.

but instead held the government liable if it did change the rules. The government would bear the risk of loss resulting from that change, which loss was measured by the plaintiffs' common law contract damages. In the case at bar, the Petitioner promised utility service to the Plaintiffs. This did not necessarily mean that the Petitioner could not subsequently change the requirements for obtaining that service, but the Petitioner bears the risk that such change might result in a breach of the previously existing agreement.

It must be remembered that one of the initial statements of the Petitioner is that *"over 100 years ago this Court plainly stated that a cause of action for damages is not available to a plaintiff for unconstitutional impairment of a contract right."*[37] However, and aside from all the attention given § 1983, both the majority and dissent in *Winstar* reject this conclusion.

As a practical matter, this Court observed that:

> "An even more serious objection is that allowing the Government to avoid contractual liability merely by passing any 'regulatory statute' would flout the general principle that, '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[38]

To hold that the government is not liable for breaches of its own agreements resulting from the enactment of

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[37] Petitioner's Petition at 11 (emphasis added).

[38] *Winstar* at 895; citing *Lynch v. United States*, 292 U.S. 571, 579 (1934).

legislation, would render contracts with the Government meaningless. The ability of parties who contract with the Government to rely upon the sanctity of their agreements without the fear that the Government's obligations can be erased with the stroke of a pen insures that the Government "is able to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting."[39]

Both the majority and the dissent in *Winstar* reached the same conclusion, albeit for different reasons, that the Government had breached its express promise, and was liable to the thrifts on both contractual and constitutional theories. Therefore, the Petitioner is simply wrong when it states that damages are not available to the Respondent as a result of the Petitioner's impairment of a contract right. *Winstar* reached exactly the opposite conclusion.

The only other case cited by the City in support of the Respondent's contention that no common law damage cause of action exists as a result of unconstitutional impairment was *Andrews v. Anne Arundel County*, 931 F. Supp. 1255 (D. Md.1996). However, the decision in *Andrews* is not a good candidate for the City's position.

First, that decision is expressly contrary to the interpretation of *Carter* by the U.S. Supreme Court in both *Dennis* and *Monell* where *Carter* was construed narrowly to exclude a Section 1983 claim for a Contracts Clause violation solely because a Section 1983 claim was not pled.[40]

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[39] *Winstar* at 913 (Breyer, J., concurring).

[40] See *Dennis* at 443, note 4 citing *Monell v. City of New York Dept. of Social Services*, 436 U.S. 658, 684, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Second, *Andrews* also ignored the statement in *Dennis* that Section 1983 should be "liberally and beneficently construed."[41]

> "Even more relevant to this case, we have rejected attempts to limit the types of constitutional rights that are encompassed within the phrase 'rights, privileges, or immunities.'" *Dennis* at 445-446.[42]

Third, as pointed out in *TM Park*, if Section 1983 can be used to assert a claim under the Commerce Clause as the *Dennis* Court held, the factors supporting that holding are just as compelling with regard to the Contract Clause.[43]

Fourth, as noted by the *TM Park* court:[44]

> "It is unclear, however, from either the district court of Fourth Circuit's opinions in *Andrews* whether they considered *Dennis*."[45]

Therefore, authority cited by the Petitioner is limited to one lower federal court case[46] that lacked any significant

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[41] *Dennis* at 443.

[42] The fact of the matter is that *Andrews* did not even discuss, let alone distinguish, the *Dennis* decision. Indeed, even the court in *TM Park* questioned the persuasiveness of the *Andrews* decision when it stated that it is unclear, however, from either the district court or Fourth Circuit opinions in *Andrews* whether they considered *Dennis*.

[43] Although this decision was vacated on grounds of ripeness in *TM Park Ave. Assocs. v. Pataki*, 214 F.3d 344 (2d Cir. 2000), the Court expressly noted, at pages 349-350, without disapproval, that the District Court's holding that Section 1983 applied to a Contract Clause claim.

[44] *TM Park* at 164.

[45] *Id.*

analysis of the issue and failed to address the *Dennis* holding, and a second decision[47] in which this Court held for the plaintiffs on their claim for common law contract damages arising out of the unconstitutional impairment of the plaintiffs' contract rights.

The Ninth Circuit Court of Appeals, following the lead of the U.S. Supreme Court in *Dennis* and, consistent with other federal cases cited herein, has clearly addressed the issues raised by the City and has concluded that Section 1983 applies to Contract Clause violations of the U.S. Constitution.

CONCLUSION

The Petitioner's major premise is that there is a split of authority on the primary issue before the court, that is, that an aggrieved party cannot make a claim for common law contract damages based upon an unconstitutional impairment. However, the case relied upon by the Petitioner has been distinguished so many times that reliance upon it is misplaced.

Instead, subsequent decisions of this and other courts have recognized that an aggrieved party will have a common law cause of ~~action~~ based upon an unconstitutional impairment,[48] and a cause of action under Section 1983 based upon an unconstitutional impairment.[49] Therefore,

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[46] *Andrews.*

[47] *Winstar.*

[48] *Winstar.*

[49] *Dennis.*

the Petitioner is incorrect when it argues that no cause of action exists, in fact two separate and distinct causes of action exist.

The Respondent requests that the Court deny the Petition.

Respectfully submitted this 28th day of October, 2004.

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In The
Supreme Court of the United States

THE CITY OF MARYSVILLE,
A WASHINGTON MUNICIPAL CORPORATION,

Petitioner,

v.

VINE STREET COMMERCIAL PARTNERSHIP,
A WASHINGTON GENERAL PARTNERSHIP, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Washington, Division I

REPLY IN SUPPORT OF THE CITY OF MARYSVILLE'S PETITION FOR A WRIT OF CERTIORARI

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REASONS THE WRIT SHOULD BE GRANTED

The constitutional issue presented in this Petition is whether a plaintiff has a civil rights claim based solely upon a violation of the Contract Clause. Almost 120 years ago, in *Carter v. Greenhow*, the Supreme Court declared that the "only right" secured to a plaintiff by the Contract Clause was the right to declaratory relief, *i.e.*, the "right to have a judicial determination declaring the nullity of the attempt to impair its obligation."[1] But this Court has never specifically addressed the issue of whether a plaintiff has a civil rights claim based on a violation of the Contract Clause. Because the lower courts are in conflict over this issue, and it is of substantial importance to state and local governments, the City of Marysville respectfully asks the Court to grant certiorari and settle this specific issue once and for all.

RESPONSE TO ISSUES RAISED BY VINE STREET

1. The Decision On Appeal Is In Conflict With A Previous Decision Of This Court.

Ignoring *Carter v. Greenhow*, Vine Street asserts that the Washington State Court of Appeals' opinion in *Vine Street II* does not conflict with any decision of the United States Supreme Court. First, Vine Street surprisingly claims that this Court decided the issue presented in this Petition in its 1991 decision of *Dennis v. Higgins*,[2] asserting "the *very reason* that this Court accepted review in *Dennis* was to resolve the *very question* that the Petitioner

[1] *Carter v. Greenhow*, 114 U.S. 317, 322 (1885).

[2] *Dennis v. Higgins*, 498 U.S. 439 (1991).

contends is yet unresolved."[3] Vine Street appears to have their constitutional clauses mixed up. The question presented in *Dennis* was "whether suits for violations of the *Commerce Clause* may be brought under . . . 42 U.S.C. § 1983."[4] But the issue presented in this Petition does not involve the *Commerce Clause*. Instead, the issue presented here is whether plaintiffs are entitled to file suit under §1983 based solely upon a violation of the *Contract Clause*.[5] This issue was not decided by the Court in *Dennis*.

Second, Vine Street disregards the fact that *Vine Street II* conflicts with this Court's decision in *Carter v. Greenhow*. Vine Street contends that *Carter* is inapplicable because the plaintiff in *Carter* had not filed a Contract Clause claim. While it is true that the plaintiff had not attempted to "litigate his rights" under the Contract Clause, the Supreme Court in *Carter* took the opportunity to define what those rights were. The *Carter* Court explicitly stated that under the Contract Clause, a plaintiff "has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation. **This is the *only right* secured to him by that clause of the Constitution.**"[6]

In rendering this decision almost 120 years ago, the *Carter* Court utilized the same analysis this Court recently

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[3] Opposition Brief, pp. 3-4 (emphasis added).

[4] *Dennis*, 498 U.S. at 440 (emphasis added).

[5] *See Petition for Certiorari*, page i.

[6] *Carter*, 114 U.S. at 322 (emphasis added).

relied upon in *Golden State v. Los Angeles*,[7] *Dennis v. Higgins*,[8] and *Gonzaga University v. John Doe*.[9] In these cases, this Court employed a two-part test to ascertain whether a statutory or constitutional violation can be remedied under §1983. Under this two-part test, the Court must first determine whether the plaintiff has "assert[ed] the violation of a federal right."[10] Based on *Carter*, Vine Street cannot meet the first part of this test.

In *Carter*, this Court stated, without reservation, that the Contract Clause does not confer any individual "rights" on plaintiffs:

> How and in what sense are these rights [contract rights] secured to him by the constitution of the United States? The answer is, by that provision, article 1, § 10, which forbids any state to pass laws impairing the obligations of contracts. **That constitutional provision, so far as it can be said to confer upon or secure to any person *any individual rights*, does so only *indirectly and incidentally*.** In any judicial proceeding necessary to vindicate his rights under a contract affected by such legislation, **he has a *right* to have a judicial determination declaring the nullity of the attempt to impair its obligation. This is the *only right* secured to him by that clause of the constitution.**[11]

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[7] *Golden State Transit Corporation v. Los Angeles*, 493 U.S. 103 (1989).

[8] *Dennis v. Higgins*, 498 U.S. 439 (1991).

[9] *Gonzaga University v. John Doe*, 536 U.S. 273 (2002).

[10] *Golden State*, 493 U.S. at 106.

[11] *Carter*, 114 U.S. at 322 (emphasis added).

Thus, the Washington Court of Appeals' decision in *Vine Street II*, holding that the Contract Clause conferred a "federal right" on Vine Street that can be remedied under §1983 is in direct conflict with the *Carter* Court's decision that the only "rights" conferred to an individual under the Contract Clause are "indirect" and "incidental."

2. There Is A Division Of Authority On This Issue In The Lower Courts.

Vine Street claims there is no confusion over this issue in the lower courts, but cites only those cases supporting its view of what the law should be. To the contrary, the lower court decisions speak for themselves. While the Fourth Circuit has expressly held that there is no remedy under §1983 for violation of the Contract Clause,[12] the Ninth Circuit recently issued a decision to the contrary.[13] While the Second Circuit[14] and State of Oregon[15] have questioned whether there is any remedy under §1983 for violation of the Contract Clause, both the state courts of

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[12] *Andrews v. Anne Arundel County, Md.*, 931 F. Supp. 1255 (D. Md. 1996), *aff'd*, 114 F.3d 1175 (4th Cir. 1997), *cert. denied*, 139 L. Ed. 2d 489, 118 S. Ct. 600 (1997). Vine Street's response to *Andrews* is that this decision should be ignored because, in Vine Street's opinion, "it lacked any significant analysis of the issue." Opposition Brief, pp. 17-18. On the contrary, the *Andrews* court explicitly stated that it declined "to rule on the basis of a forecast that the Supreme Court will at its first opportunity expressly overrule *Carter v. Greenhow*." 931 F. Supp. at 1267.

[13] *Southern California Gas Co. v. Santa Ana*, 336 F.3d 885 (9th Cir. 2003).

[14] *Haley v. Pataki*, 106 F.3d 478 (2nd Cir. 1997).

[15] *Allen v. County of Jackson County*, 169 Ore. App. 116, 7 P.3d 739 (2000) (*see* concurring opinion authored by Edmonds, P.J.).

California[16] and Nebraska[17] have issued decisions implicitly holding (without any discussion) that a violation of the Contract Clause can be remedied under §1983.

For Vine Street to contend that there is no division of authority on this issue in the lower courts is simply to ignore the obvious.

3. Expansion Of Civil Rights Claims Is An Issue Of Substantial Importance To All State And Local Governments.

Vine Street claims that this issue is irrelevant and of no importance because it has two separate causes of action for damages: (1) a common law cause of action for breach of contract *based upon an unconstitutional impairment*, and (2) a cause of action under §1983 *based upon an unconstitutional impairment*.[18] Vine Street is wrong and is simply raising a red herring in an attempt to sway the Court not to accept review of the discrete constitutional issue set forth in the City's Petition for Certiorari.

First, as set forth in the City's Petition, there is a distinct difference between common law breach of contract and unconstitutional impairment.[19] Those differences need not be repeated here.

Second, Vine Street *never* pled a claim for common law breach of contract, and they do not have a breach of

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[16] *Board of Administration v. Pete Wilson*, 57 Cal. App. 4th 967, 67 Cal. Rptr. 2d 477 (1997).

[17] *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995).

[18] Opposition Brief, pp. 18-19.

[19] *See* Petition for Writ of Certiorari, pp. 17-18.

contract claim in this action. App. 12-13.[20] The *only* damage claim Vine Street pled was under §1983, based upon unconstitutional impairment of a contract. Accordingly, the only issue before this Court is the one set forth in the City's Petition for Review, *i.e.*, whether plaintiffs can pursue a §1983 claim based solely on a violation of the Contract Clause.

Finally, as this Court is likely well aware, the scope of civil rights actions filed against government under 42 U.S.C. §1983 has expanded exponentially in the past 30 years. Whether the scope should, or should not, be expanded further is a decision this Court ought to make, not the Washington State Court of Appeals, or the Ninth Circuit Court of Appeals.

Section 1983 is derived from the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. At the time of its enactment, shortly after the Civil War, the Klan was running rampant throughout the South, and "southern officials were either unwilling or unable to curb the Klan's lawlessness."[21] The Supreme Court recognized that Congress's passage of this federal Act was a direct and proper response to "the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights."[22] As Justice

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[20] Vine Street, fearing that the Washington Court of Appeals would follow *Carter v. Greenhow* and dismiss their §1983 claim, argued that they also had a claim for damages under a theory of common law breach of contract. The Court of Appeals summarily dismissed that claim based on the fact that it had not been pled in Plaintiffs' Amended Complaint for Damages.

[21] Rodney A. Smolla, 2 *Federal Civil Rights Act* § 14:2 (3d ed. 2001).

[22] *Wilson v. Garcia*, 471 U.S. 261, 276 (1985).

Kennedy aptly noted in his dissent in *Dennis v. Higgins*, §1983 was "an extraordinary remedy passed during Reconstruction to protect basic civil rights against oppressive state action."[23] The majority in *Dennis* did not disagree with this historical finding.[24]

After its enactment, §1983 lay substantially dormant for nearly a century, until the modern §1983 doctrine began with the 1961 ruling in *Monroe v. Pape*, where this Court held that the defendant police officers had acted "under color of law" within the meaning of §1983, and the plaintiff could proceed with a civil rights claim.[25]

While there is no doubt that §1983 has helped curbed real and harmful civil rights violations, there is also no doubt that in recent years state and local governments have become targets of many unwarranted §1983 claims. Currently, "[p]rivate rights of action based on 42 U.S.C. §1983 are flooding the federal courts."[26] Today, "tens of

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[23] *Dennis*, 498 U.S. at 465 (Kennedy, J., dissenting).

[24] The drafters of §1983 likely did not intend to provide an "extraordinary remedy" to the courts for educated, intelligent, and experienced business men and women, such as the individuals who comprise the partnership in Vine Street. This does not, however, completely forbid its application in the modern world; but it should give the courts pause to consider whether expanding §1983's reach to include the Contract Clause is necessary or appropriate.

[25] *Monroe v. Pape*, 365 U.S. 167, 183-84 (1961).

[26] Wayne McCormack, "Federalism and §1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I," 60 U.Va.L.Rev. 1 (1974). In 1960 (before *Monroe v. Pape* was decided), approximately three hundred actions were filed under the general heading of civil rights. In 1972, approximately eight thousand were filed. *Id.* By the 1980s, the annual number had risen to over 30,000. *See Patsy v. Board of Regents*, 457 U.S. 496, 533 n.20 (1982) (Powell, J., dissenting). In his civil rights treatise, Smolla noted that in 2001, "tens

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thousands" of civil rights cases are filed against state and local government every year, and the number is still rising. *Id.* Unfortunately, many of these cases lack merit, as this Court itself has recognized:

> [T]here is increasing sensitivity in the Supreme Court to the possibility that as a result of often being targets of §1983 plaintiffs, state and local government officials are being improperly over-deterred in the performance of their government duties. . . . Implicit in these developing judicial attitudes is the position that the remedies provided by §1983 have become far too wide-ranging in scope and effect.[27]

There is also fear that the courts will become overburdened with §1983 cases of questionable merit.[28] Each of these valid concerns forms the backdrop of the Petition now before the Court.

CONCLUSION

The Court has never expressly decided the important constitutional issue presented in this Petition, *i.e.*, whether suits for violation of the Contract Clause may be brought under 42 U.S.C. §1983. In *United States v. Winstar*,[29] this Court recently acknowledged the division of authority on this issue below. In *Winstar*, the majority

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of thousands of §1983 cases are brought each year, alleging violations of federal constitutional and statutory rights." Smolla, at § 14:7.

[27] Sheldon H. Nahmod, 1 *Civil Rights and Civil Liberties Litigation*, § 1:7, 1:8 (4th ed. 2004).

[28] *Id.* at §§ 1:6 & 1:7.

[29] *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

scolded the dissent for pronouncing that damages were the "exclusive remedy at law for breach of contract," pointing out the obvious remedy of specific performance.[30] Then, citing with approval to *Carter*, the Court also noted an individual's right, under the Contract Clause, to request declaratory relief. *Id.*

But not only did this Court in *Winstar* quote *Carter* with approval, this Court additionally quoted a Stanford Law Review article which "suggested" that "analysis under the Contract Clause is *limited* to declaring the statute unconstitutional," and that the Contract Clause does "not authorize the court to award damages."[31] This Court's choice of the word "suggested" indicates its awareness that this specific issue is unsettled.

Now is the time for the Supreme Court to decide this issue. In 1997, the issue was presented to this Court in *Andrews v. Anne Arundel County, supra*, where the Fourth Circuit held that suits for violation of the Contract Clause could *not* be brought under §1983. The Court denied certiorari in *Andrews*. Since then, both the Ninth Circuit and the State of Washington have issued contrary decisions, allowing §1983 suits to proceed based solely on a violation of the Contract Clause. Additionally, this Court has also decided cases like *Gonzaga University v. John Doe, supra,* analyzing whether federal statutes confer rights enforceable under §1983. In *Gonzaga*, the majority clarified its test as follows:

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[30] *Winstar Corp.*, 518 U.S. at 887, n.32.

[31] *Id., citing* Note, Takings Law and the Contract Clause: A Takings Law Approach to Legislative Modifications of Public Contracts, 36 Stan. L. Rev. 1447, 1462 (1984) (emphasis added).

> **We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under §1983.** Section 1983 provides a remedy only for the deprivation of "rights . . . secured by the [Federal] Constitution and laws" . . . Accordingly, it is *rights*, not the broader or vaguer "benefits" or "interests," that may be enforced under the authority of that section.[32]

The question here is, does the Contract Clause unambiguously confer a federal *right* on individuals? In *Carter v. Greenhow*, this Court declared that it did not. But the lower courts are not in agreement on how to construe and apply the 120-year-old *Carter* decision. Because of this confusion, and the undeniable importance of this issue, the City requests that its Petition for Certiorari be granted.

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[32] *Gonzaga University*, 536 U.S. at 283 (italics in original, bold added).